No. 99-2047-CSX Title: Anthony Palazzolo, Petitioner
v.
Rhode Island, et al.

Docketed: June 21, 2000 Court: Supreme Court of Rhode Island

Entry	Date	Proceedings and Orders
	May 3 2000	Application (99A906) to extend the time to file a petition for a writ of certiorari from May 25, 2000 to June 23, 2000, submitted to Justice Souter.
	May 3 2000	Application (99A906) granted by Justice Souter extending the time to file until June 23, 2000.
	Jun 21 2000	Petition for writ of certiorari filed. (Response due August 17, 2000)
	Jul 17 2000	Order extending time to file response to petition until August 17, 2000.
	Aug 17 2000	Brief of respondents Rhode Island, et al. in opposition filed.
	Aug 28 2000	Reply brief of petitioner Anthony Palazzolo filed.
	Aug 30 2000	DISTRIBUTED for Conference of September 25, 2000
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	Petition GRANTED. SET FOR ARGUMENT February 26, 2001. **********
	Nov 20 2000	Blanket consent to the filing of amicus briefs in support of either party received from counsel for the petitioner and counsel for the respondents.
	Nov 22 2000	Brief amicus curiae of National Association of Home Builders filed.
	Nov 22 2000	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Nov 22 2000	Joint appendix filed.
	Nov 22 2000	Brief of petitioner Anthony Palazzolo filed.
	Nov 22 2000	Brief amicus curiae of California Coastal Property Owners Association filed.
	Nov 22 2000	Brief amicus curiae of Defenders of Property Rights filed.
	Nov 24 2000	JOINT LODGING 1 consisting of twenty spiral bound copies of exhibits and LODGING 2 consisting of twenty oversized copies of a plat map and aerial photographs submitted by counsel for the petitioner.
	Nov 24 2000	Brief amici curiae of American Farm Bureau and Rhode Island Farm Bureau filed.
	Nov 24 2000	Brief amicus curiae of Institute for Justice filed.
	Nov 24 2000	Brief amici curiae of W. Frederick Williams, III and Louise Williams filed.
	Dec 4 2000	LODGING consisting of twenty copies of appendix material submitted by counsel for amici Williams.
	Dec 7 2000	Order extending time to file respondents' brief on the merits to and including January 3, 2001.
	Jan 3 2001	Brief of respondents Rhode Island, et al. filed.
	Jan 3 2001	Brief amici curiae of National Conference of State Legislatures, et al. filed.
	Jan 3 2001	Brief amici curiae of American Planning Association, et al.

No. 99-2047-CSX

Entry	Date	Proceedings and Orders
		filed.
	Jan 3 2001	Brief amicus curiae of Save the Bay-People for Narragansett Bay filed.
	Jan 3 2001	Brief amicus curiae of County of Santa Barbara filed.
	Jan 3 2001	Brief amici curiae of California, et al. filed.
	Jan 3 2001	Brief amici curiae of National Wildlife Federation, et al. filed.
	Jan 3 2001	Brief amici curiae of Daniel W. Bromley, et al. filed.
	Jan 3 2001	Brief amici curiae of John M. Teal, et al. filed.
	Jan 3 2001	Brief amicus curiae of United States filed.
	Jan 3 2001	Brief amici curiae of Bd. of County Commissioner of La Plata County Co., et al. filed.
	Jan 4 2001	LODGING consisting of twenty bound copies of The State of Rhode Island Coastal Resources Management Program submitted by counsel for the respondent.
	Jan 16 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Jan 16 2001	Reply brief of petitioner Anthony Palazzolo filed.
	Jan 18 2001	CIRCULATED.
	Jan 22 2001	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Feb 6 2001	Record filed.
	Feb 26 2001	ARGUED.

Supreme Court, U.S.
FILED

99 2047 JUN 21 2000

OFFICE OF THE CLERK

No. _____

In the

Supreme Court of the United States

October Term, 1999

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

PETITION FOR WRIT OF CERTIORARI

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN B. WEBSTER
Attorney at Law
875 Centerville Road
Warwick, Rhode Island 02886
Telephone: (401) 822-1300
Facsimile: (401) 821-4188

Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

A. Factual Background 2

B. Judicial Proceedings 3

REASONS FOR GRANTING THE WRIT 4

I. WHETHER A POST-ENACTMENT PURCHASER IS CATEGORICALLY BARRED FROM ASSERTING A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT 4

A. The Issue and the Conflict 5

B. The Appropriateness of Resolving the Issue Here . 10

II. WHETHER A PROPERTY OWNER MUST SUBMIT "ADDITIONAL APPLICATIONS" IN ORDER TO RIPEN A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS PROCEDURE THAT DIVIDES THE LOWER COURTS 13

III. THE LOWER COURTS ARE ALSO IN CONFLICT AS TO WHETHER REMAINING USES OF REGULATED PROPERTY ARE ECONOMICALLY VIABLE MERELY BECAUSE THE PROPERTY RETAINS SOME VALUE 20

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Armstrong v. United States, 364 U.S. 40 (1960) 5

Boise Cascade Corp. v. State, 991 P.2d 563 (Or. Ct. App. 1999), *petition for review filed*, No. S47459 (Or. Apr. 18, 2000) 6

Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 10

City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va.), *cert. denied*, 525 U.S. 826 (1998) 7

Cottonwood Farms v. Board of County Commissioners, 763 P.2d 551 (Colo. 1988) 9-10

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) 7

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) 10, 21-22

DiBattista v. State, 717 A.2d 640 (R.I. 1998) 12

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 10-12

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000) 7

Grant v. South Carolina Coastal Council, 461 S.E.2d 388 (S.C. 1995) 7

Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) 17, 20

TABLE OF AUTHORITIES—Continued

Page

Hunziker v. State, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) 7

Karam v. State, 705 A.2d 1221 (N.J. Super. Ct. App. Div. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999) 9

Kim v. City of New York, 681 N.E.2d 312 (N.Y.), *cert. denied*, 522 U.S. 803 (1997) 7

Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988) 22

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 3-6, 20-22

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 15-18

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) 16-18

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 7-8

Palm Beach Isles Associates v. United States, 208 F.3d 1374 (Fed. Cir. 2000) 6

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 3, 7, 20

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 12, 15, 19

Urban v. Planning Board of Manasquan, 592 A.2d 240 (N.J. 1991) 9

TABLE OF AUTHORITIES—Continued

Page

Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223 (Fla. Dist. Ct. App.), *rev. denied*, 613 So. 2d 3 (Fla. 1992) 9

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 15, 19

Constitution and Statute

U.S. Const. amend. V ..... passim

amend. XIV, § 1 1

28 U.S.C. § 1257(a) 1

Miscellaneous

William S. Walter, *Appraisal Methods and Regulatory Takings*, 63 Appraisal J. 331 (1995) 22

PETITION FOR WRIT OF CERTIORARI

Anthony Palazzolo respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 746 A.2d 707 (2000); it appears at Appendix A to the petition. The decision of the Superior Court of Rhode Island (Washington County) is not reported; it appears at Appendix B to the petition.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on February 25, 2000. Petition Appendix (Pet. App.) at A-1. On May 3, Justice Souter granted petitioner's timely application to extend the time within which to file the petition to and including June 23, 2000. No. 99A906. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in pertinent part: "nor shall private property be taken for public use without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

For more than four decades, Petitioner Anthony Palazzolo has been attempting to develop coastal property in Westerly, Rhode Island. Because nearly all of this property consists of "wetlands"—the contemporary name for what used to be called marshes or ponds—Mr. Palazzolo must fill the property to be able to develop it into single-family homes (for which it has long been subdivided) or into a recreational beach facility. But respondent Coastal Resources Management Council (CRMC) and its predecessors have repeatedly denied him permission to fill, such that the nominally private property is now de facto devoted to public use as "a refuge and feeding ground for fish, shellfish, and birds," as "a buffer for flooding," and as a filter for "run-off into the pond." Pet. App. at A–3. As a result of these repeated denials, Mr. Palazzolo filed this inverse condemnation action against CRMC and respondent the State of Rhode Island in the courts of that state, alleging that CRMC's actions effected a compensable regulatory taking of his property for public use within the meaning of the Fifth Amendment to the United States Constitution. Mr. Palazzolo did not prevail in that venue, and now he seeks relief from this Court for the federal constitutional errors committed by the court below.

A. Factual Background

The subject parcel consists of eighteen acres of wetlands and "a few additional" acres of uplands. Pet. App. at A–3 n.1. Mr. Palazzolo acquired a majority of the property in 1959 and 1960, and the remainder of the property in 1969. *Id.* at A–2 to –3. (The state courts put great stock in the fact that he ow. d the property by means of a sole-shareholder corporation until February of 1978, when he became the owner in his individual capacity. *Id.* at A–13 to –15.) In 1963, Mr. Palazzolo applied for state approval to fill the parcel; that application was denied. He applied again in 1966. Some five years later, CRMC's predecessor approved the application, *id.* at A–4; but the approval was revoked just seventeen days after Mr. Palazzolo received

it. He applied again in 1983; that application was denied. *Id.* at A–5. In 1985, Mr. Palazzolo applied yet again for approval to fill the property; yet again, his application was denied. *Id.*

B. Judicial Proceedings

After unsuccessfully seeking judicial review of the latest denial, Mr. Palazzolo timely filed this inverse condemnation action, alleging that he suffered a compensable regulatory taking at the hands of CRMC. *See id.* at B–1 ("plaintiff contends that the CRMC's actions violated the Fifth Amendment's just compensation clause as incorporated by the Due Process Clause of the Fourteenth Amendment"). In 1997, the state trial court issued a written decision rejecting that takings claim. *See id.* at B–1. Last year, in a published opinion, the Supreme Court of Rhode Island affirmed.

Observing that Mr. Palazzolo based his takings claim on both *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), the court below ruled that he could prevail on neither theory. As to each, the court found dispositive the fact that Mr. Palazzolo did not take title to the property in his individual capacity until 1978, at which time regulations prohibiting the filling of wetlands were already in place. First, as to the *Lucas* theory, the court concluded categorically that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Second, as to the *Penn Central* theory, the court held essentially the same thing, that where the regulation predates the acquisition of the property, the owner categorically lacks "reasonable investment-backed expectations." *Id.* at A–17.

But even if Mr. Palazzolo could overcome those categorical hurdles, he still could not prevail. This particular case was not ripe, concluded the court below, because Mr. Palazzolo's four applications over a span of more than two decades were not enough: he needed to "file additional applications seeking

permission for less ambitious uses" before his claim would be ripe. *Id.* at A–12 n.6. Finally, the court gave another reason why Mr. Palazzolo could not satisfy the requirements of *Lucas* even if the case were ripe. Based solely on evidence that the property had a residual value greater than zero, the court concluded that Mr. Palazzolo "had not been deprived of all beneficial use of his property." *Id.* at A–13. For all these reasons, the court affirmed the dismissal of his regulatory takings claim.

As a result of these rulings by the Rhode Island Supreme Court, particularly the first two, Mr. Palazzolo is forever barred from obtaining compensation for regulations that require his eighteen-plus acres of land "to be left substantially in its natural state." *Lucas*, 505 U.S. at 1018. Accordingly, Mr. Palazzolo now "owns"—if that term can be used ironically—nominally private property that has actually been "pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

Mr. Palazzolo timely files this petition for certiorari.

REASONS FOR GRANTING THE WRIT

On three important questions of takings law and procedure, the court below issued decisions that are in conflict with the decisions of other lower courts, both state and federal. All of those conflicts warrant resolution by this Court.

I

WHETHER A POST-ENACTMENT PURCHASER IS CATEGORICALLY BARRED FROM ASSERTING A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS LAW ON WHICH THE LOWER COURTS ARE IN CONFLICT WITH EACH OTHER AND WITH THIS COURT

As described above, the Supreme Court of Rhode Island ruled that a *Lucas*-type "regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property." Pet. App. at A–14. In addition, the court ruled that a *Penn Central*-type regulatory takings claim must necessarily fail in this situation as well, because a property owner can have no "reasonable investment-backed expectations" of developing property if, at the time he acquired it, "there were already regulations in place limiting [his] ability to" develop. *Id.* at A–17. Together, these two rulings operate to categorically bar regulatory taking claims whenever the enactment of the regulation predates the claimant's acquisition of the property. In this regard, the decision below conforms to a disturbing trend in the lower courts to strip property owners of the protections of the Fifth Amendment and to excuse governments from their "constitutional obligation to pay just compensation." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Because this decision and this trend cannot be reconciled either with the decisions of other lower courts or of this Court, it is incumbent upon this Court to resolve the issue.

A. The Issue and the Conflict

In *Lucas*, this Court "found categorical treatment appropriate . . . where regulation denies all economically beneficial or productive use of land." 505 U.S. at 1015. The Court thus went on to reaffirm the "categorical rule that total regulatory takings *must be compensated*." *Id.* at 1026 (emphasis added). The government was left with one escape from this obligation: "Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Id.* at 1027. In other words, the government can avoid paying compensation for land-use limitations that otherwise amount to categorical takings only if those limitations on use "inhere in the title itself, in the restrictions that *background principles* of the State's law of property

and nuisance already place upon land ownership." *Id.* at 1029 (emphasis added).[1]

It is not surprising that in the aftermath of *Lucas*, lower courts have been called on to decide whether a particular regulatory prohibition on land use was justified by a background principle of property or nuisance law. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000) (ruling that "in order to assert a defense [to a regulatory taking] under the navigational servitude, the Government must show that the regulatory imposition was for a purpose related to navigation"); *Boise Cascade Corp. v. State*, 991 P.2d 563, 570 (Or. Ct. App. 1999) (rejecting the state's "background principles" defense to a regulatory taking because there is "no authority for the proposition that knocking down a bird's nest on one's property has ever been considered a public nuisance"), *petition for review filed*, No. S47459 (Or. Apr. 18, 2000).

Other lower courts, however, have taken the background principles exception of *Lucas* far beyond its moorings in the common law of easements and nuisance. Rather than asking whether a recently prohibited land use was "*always* unlawful" under "relevant property and nuisance principles," *Lucas*, 505 U.S. at 1030 (emphasis in original), these other courts merely ask whether the use was "regulated" *before the present owner acquired the property*. In other words, these courts wholly dispense with the notion that, unless compensation is paid, a confiscatory regulation may "do no more than duplicate the result that could have been achieved in the courts" under the law of easements and nuisance. *Id.* at 1029. Instead, confiscatory

[1] *Lucas* itself presented three examples of compensation-defeating background principles: (1) "a permanent easement that was a preexisting limitation on the landowner's title," such as the federal government's navigational servitude; (2) a prohibition against flooding adjacent property; and (3) a prohibition against locating a nuclear generating plant astride an earthquake fault. *See id.* at 1028-30.

regulations without compensation are automatically sustained by these courts so long as the regulations were simply "on the books" before the property was acquired by the present owner. Under this regime, a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.[2]

Other courts have reached the very same result under the rubric of reasonable "investment-backed expectations," a term derived from *Penn Central*, 438 U.S. at 124, 127, 130 n.27. A recent example is *Good v. United States*, in which the Federal Circuit held that "[t]he requirement of investment-backed expectations 'limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation.'" 189 F.3d 1355, 1360 (Fed. Cir. 1999) (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)), *cert. denied*, 120 S. Ct. 1554 (2000). That is, any person "who buys with knowledge of a [regulatory] restraint assumes the risk of economic loss"—no compensation will be granted. *Id.* at 1361; *accord id.* at 1363 ("Appellant's lack of reasonable investment-backed expectations defeats his takings claim as a matter of law."). Again, this is the principle that a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

There are many reasons why this legal principle cannot stand. The most obvious reason is its fundamental incompatibility with *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). The respondent in that case was a land-use agency

[2] *See City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Kim v. City of New York*, 681 N.E.2d 312, 314-16 (N.Y.), *cert. denied*, 522 U.S. 803 (1997); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place since at least since 1976," and in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract." *Id.* at 859 (Brennan, J., dissenting). Who could acquire property in this tract and possibly expect to develop it without having to submit to imposition of the lateral access deed restriction? Well, the Nollans bought a lot in the Faria Tract in 1982 or thereafter and sought to invalidate the restriction as a violation of the Takings Clause. This Court, of course, ruled in the Nollans' favor, holding that the restriction constituted a taking because it did not "substantially advance[] legitimate state interests." *Id.* at 834.

In dissent, Justice Brennan challenged the Court's holding on several grounds, including the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 860. With such notice, the Nollans "could have no reasonable expectation of . . . approval of their [development] permit application without any deed restriction ensuring public access to the ocean." *Id.* What was the Court's response? *Nollan* opined:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 834 n.2.

The decision below cannot be reconciled with *Nollan*. If it were really true that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the

property," Pet. App. at A–14, then how could the Nollans have "maintained"—indeed, prevailed on—their regulatory takings claim? The relevant statute predated their acquisition of property in the Faria Family Beach Tract by at least a decade, the Commission's stringent anti-development regime predated it by at least six years, and the Commission's policy of explicit deed restrictions predated it by at least three years. While the court below rejected Mr. Palazzolo's takings claim because he "did not become the owner of the parcel until 1978," *after* "the regulations limiting his ability to fill the wetlands were already in place," Pet. App. A–17, this Court sustained the Nollans' takings claim even though "they acquired the land *well after* the Commission had begun to implement its policy," 483 U.S. at 834 n.2 (emphasis added).

Nor can the decision below be reconciled with decisions of other state courts and of the Ninth Circuit. The New Jersey courts have recently reaffirmed "the right of a property owner to fair compensation when his property is zoned into inutility by changes in the zoning law passes to the next owner despite the latter's knowledge of the impediment to development." *Karam v. State*, 705 A.2d 1221, 1229 (N.J. Super. Ct. App. Div. 1998), *aff'd and adopted*, 723 A.2d 943 (N.J.), *cert. denied*, 120 S. Ct. 51 (1999); *accord Urban v. Planning Board of Manasquan*, 592 A.2d 240, 242-43 (N.J. 1991). In Florida, the rule is likewise: an owner's "bundle of property rights is as he purchased it." *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *rev. denied*, 613 So. 2d 3 (Fla. 1992). *Vatalaro* decisively rejected the government's argument that the owners could not possibly have suffered a compensable taking merely because they had "purchased their property after the enactment of the . . . Wetlands Protection Act of 1984 [and] were constructively aware that their property was subject to the provisions of the act." *Id.* *See generally Cottonwood Farms v. Board of County Commissioners*, 763 P.2d 551, 555 (Colo. 1988) (observing that "[t]he

majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations on constitutional grounds, but does constitute a factor").

The Ninth Circuit, too, has rejected the rule adopted by the Rhode Island Supreme Court. In *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 470-71 (9th Cir. 1994), the defendant city enacted a mobilehome space rent control ordinance in 1979 and two mobilehome conversion ordinances in 1982; however, the plaintiff property owner did not purchase the subject mobilehome park until 1983. Based on that chronology, the Ninth Circuit dismissed the property owner's *facial* regulatory takings claims. The court held that a facial taking occurs, if at all, at "the time of a statute's enactment" and that because the owner "did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim." *Id.* at 476. With respect to *as-applied* takings claims, by contrast, the Ninth Circuit recognized that a post-enactment purchaser may indeed "suffer injury" and thus have standing to assert the claims. *Id.* n.8. This recognition stands in marked contrast to the principle adopted by the court below, under which a post-enactment purchaser is categorically barred from asserting *any* kind of regulatory takings claim. *See also Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1425 (9th Cir. 1996) (affirming a compensation award of $1.45 million in favor of a property owner that had purchased the regulated property at the very *end* of a six-year permit application process), *aff'd*, 526 U.S. 687 (1999).

B. The Appropriateness of Resolving the Issue Here

In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 (1987), the Court observed that "[c]oncerns with finality left us unable to reach the remedial question in the earlier cases where we have been asked to

consider the" no-compensation rule adopted by the California courts. In the circumstances presented by those cases, "[c]onsideration of the remedial question . . . , we concluded, would be premature." *Id.* In the present case, the question may arise whether consideration of the first question presented would be premature as well, given the lower court's ruling that the regulatory takings claim asserted by Mr. Palazzolo "was not ripe for judicial review." Pet. App. at A–12. For the following reasons, such consideration would ***not*** be premature.

As in *First English*, "[t]he posture of the present case is quite different" from those cases in which the Court declined to address the question presented. 482 U.S. at 311. Here, the Rhode Island Supreme Court squarely held that—regardless of whether a regulatory takings claim is otherwise ripe for judicial review, regardless of whether the regulation deprived the property of all economically viable use, and regardless of whether the regulation might otherwise effect a taking under the *Penn Central* test—such a takings claim categorically "may not be maintained where the regulation predates the acquisition of the property." Pet. App. at A–14. Accordingly, the constitutional question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property is "squarely presented here." *First English*, 482 U.S. at 312.

Consistent with *First English*, the Court should reject any "suggestion that, regardless of the state court's treatment of the question, we must independently . . . resolve the takings claim on the merits before we can reach the" question presented. *Id.* at 312-13. As in *First English*, the important point here is that the state courts themselves deemed the case "sufficient to present the issue," *id.*, and that the state courts actually decided the issue presented. *See* Pet. App. at A–14 (opining that "the trial justice's determination that a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property is a question of law that we review de novo.").

To be sure, this case differs from *First English* in that the court below determined that Mr. Palazzolo's takings claim was not ripe. But this difference is non-essential, and it provides no reasoned basis for refusing to address the first question presented. In the first place, the question whether *every* regulatory takings claim is categorically barred whenever enactment of the regulation predates the claimant's acquisition of the property is logically antecedent to the question whether a *particular* takings claim is ripe. More importantly, perhaps, there is no worry that the Court's resolution of the question presented will contravene Article III limitations on judicial power. As noted in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 733-34 & n.7 (1997), the ripeness principles fashioned by this Court in the takings context—which principles provided the basis of the lower court's ripeness ruling, *see* Pet. App. at A–10 to–11—do not implicate the "case or controversy" requirement of Article III. Rather, those principles are "*prudential* hurdles" to the assertion of regulatory takings claims. 520 U.S. at 734 (emphasis added).

Moreover, this Court would not, in resolving the question presented, be issuing an advisory opinion. On the one hand, if the lower court's "post-enactment purchaser" ruling is not reversed, that ruling will bar Mr. Palazzolo from *ever* being able to assert a regulatory takings claim with respect to the subject property *even if* he satisfies the most stringent of ripeness requirements.[3] On the other hand, if this Court does reverse the

[3] In brief, no matter what steps Mr. Palazzolo may take to surmount ripeness hurdles, he cannot possibly change the fact that the regulation predates his acquisition of the property. Therefore, the judgment below will forever preclude him from asserting a regulatory takings claim with respect to the property. *See, e.g., DiBattista v. State*, 717 A.2d 640, 642 (R.I. 1998) ("The doctrine of res judicata renders a prior judgment by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action . . . .").

"post-enactment purchaser" ruling, nothing else in the decision below would preclude Mr. Palazzolo from successfully asserting a *Penn Central*-type claim once he surmounts the requisite ripeness hurdles. *See* Pet. App. at A–17 (declining to consider any aspect of Mr. Palazzolo's *Penn Central*-based regulatory takings claim other than the fact that he became the owner of the property after the regulations were "already . . . in place"). In this situation, resolution by this Court of the first question presented by the petition would have significant and concrete consequences for Mr. Palazzolo, the very opposite of an advisory opinion.

Finally, it is appropriate to resolve the issue at this time because there will be no further proceedings between the parties, either in this litigation or in any other. As noted above, if allowed to stand, the ruling below will bar Mr. Palazzolo from ever being able to assert a regulatory takings claim. *See supra* note 3. Future judicial denial of relief to Mr. Palazzolo would be justified by the doctrine of res judicata, *see id.*, an adequate and independent state ground that would deprive this Court of jurisdiction to address the issue.

For all these reasons, this Court should resolve the conflict in the lower courts by granting the petition and addressing the important question whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

II

WHETHER A PROPERTY OWNER MUST SUBMIT "ADDITIONAL APPLICATIONS" IN ORDER TO RIPEN A REGULATORY TAKINGS CLAIM IS AN IMPORTANT AND RECURRING QUESTION OF TAKINGS PROCEDURE THAT DIVIDES THE LOWER COURTS

Mr. Palazzolo's 1983 application to respondent CRMC "sought permission to fill the entire eighteen acres of wetlands" owned by him. Pet. App. at A–11. His most recent application

in 1985 sought permission to fill a smaller portion of the property. *See id.*[4] At this time, CRMC regulations "prohibit[ed] the filling, removing or grading in coastal wetlands adjacent to Type 1 and 2 waters 'unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms.'" *Id.* at B–3 (quoting the Coastal Resources Management Plan 300.2.B(1)). Since Mr. Palazzolo's property is "adjacent to Type 1 waters," it is subject to these regulations. *Id.* Because Mr. Palazzolo's purpose in filling the wetlands concededly was not to preserve or enhance a conservation area or a storm buffer, but rather to build single-family homes or a recreational beach facility, it is hardly surprising that "CRMC denied the 1985 application" outright. *Id.*

Was this denial based on the magnitude of the wetlands proposed to be filled? Would an application to fill a smaller area have been approved by CRMC? The answer to both of these questions is *no*. As the trial court found, Mr. Palazzolo testified—without reported contradiction on this point—that "CRMC informed him that ***any*** proposal involving the filling of wetlands would be denied." *Id.* at B–5 (emphasis added). On the other hand, CRMC staff testified (also without contradiction) that "CRMC would have approved the [non-wetland] eastern end of Shore Gardens Road as a home site." *Id.*; *see also id.* at A–11 ("There was undisputed evidence in the record that it would be possible [for Mr. Palazzolo] to build at least one single-family home on the existing upland area, with no need for additional fill."). Thus, the uncontradicted evidence was that CRMC *would* permit Mr. Palazzolo to develop one single-family home on the small upland portion of his property

[4] Although the opinions of the lower courts do not specify the precise acreage sought to be filled by the 1985 application, the opinions do make clear that such application sought to fill ***less*** acreage than the 18.0 acres of wetlands sought to be filled by the 1983 application. *See id.*; *id.* at B–3. In fact, the 1985 application sought to fill just 11.4 acres of wetlands.

but *would not* permit him to fill any of the eighteen acres of wetlands, thereby precluding any development of that portion.

These facts satisfy this Court's ripeness requirements for regulatory takings claims, for "the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 186 (1985). CRMC, charged with implementing the Coastal Resources Management Plan, finally decided that the Plan barred Mr. Palazzolo from filling ***any*** wetlands. In other words, the "nature and extent of permitted development" on Mr. Palazzolo's eighteen-plus acres of land is perfectly clear: one single-family home and nothing more. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Accordingly, "[t]he demand for finality is satisfied by [Palazzolo's] claim, . . . there being no question here about how the 'regulations at issue apply to the particular land in question.'" *Suitum*, 520 U.S. at 739 (quoting *Williamson County*, 473 U.S. at 191).

Nevertheless, the court below ruled that Mr. Palazzolo's claim was not ripe because he did not seek "permission for less ambitious development plans," specifically permission for uses of the property that "would involve filling substantially less wetlands or would involve development only of the upland portion of the parcel." Pet. App. at A–11. More generally, the Rhode Island Supreme Court reached what it called the "self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." *Id.* at A–12 n.6; *accord id.* at A–11 (chiding Mr. Palazzolo because he had not "explored development options less grandiose"). The court did not cite any authority for this conclusion, but it apparently drew inspiration from the statement in *MacDonald* that "[r]ejection of exceedingly grandiose development plans does not logically

imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9.

This use of *MacDonald*—to impose a per se requirement that landowners denied permission to use their property in a particular way must *always* file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims, Pet. App. A–12 n.6—cannot be squared with the decisions of the Supreme Court of Texas or the Court of Appeals for the Eleventh Circuit.

In *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the property owners sought approval for planned development of 3,600 homes, but the town council unequivocally refused approval. Without requesting a variance or filing additional development applications, the property owners sued the town for a regulatory taking *See id.* at 931. Crucial to this claim was the allegation by the property owner that "only improvements along the lines of their 3,600 unit proposed planned development would avert a regulatory taking." *Id.* The Supreme Court of Texas considered whether, in these circumstances, the asserted takings claim was ripe under this Court's jurisprudence.

In contrast to the view of the Rhode Island court below, the Texas court held that "[t]he United States Supreme Court has indicated that such a claim may be ripe *without* the necessity of seeking a variance or filing a subsequent application." *Id.* (emphasis added). In support of this holding, the court cited none other than *MacDonald* itself! Observing that this Court had noted in that decision that "the applicant did not 'contend that *only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking*,'" the Texas court construed *MacDonald* to "impl[y] that the result [i.e., dismissal for lack of ripeness] may have been different if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal."

Mayhew, 964 S.W.2d at 932 (emphasis in original) (quoting *MacDonald*, 477 U.S. at 352 n.8). Therefore, "[t]he ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable." *Id.*

The Texas court then applied these principles to the case at hand. Because the property owners alleged that "anything less than approval for 3,600 units on their property constitutes a regulatory taking"—that is, the failure to approve the 3,600 units in and of itself effected a taking—*MacDonald* and other ripeness decisions did not require them "to submit additional alternative proposals . . . to ripen [their] complaint." *Id.* This holding is in marked contrast to the holding of the court below: unlike Mr. Palazzolo, the property owners in *Mayhew* were ***not*** required to file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims. Pet. App. A–12 n.6. Because the property owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, *while at the same time denying that such permission would avert a regulatory taking*, their claim was deemed ripe.

In *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), the Court of Appeals for the Eleventh Circuit applied this Court's regulatory takings ripeness requirements to a substantive due process claim arising from a city's refusal to rezone the claimant's property. Though the property owner had sought (and finally been denied) the rezoning necessary to consummate its proposed development, the city nevertheless argued that the court's "consideration of this claim is barred by the *MacDonald* 'reapplication' requirement." *Id.* at 1575-76. Like the court below, the city sought to impose a "requirement that, where one comprehensive plan for the property has been rejected, the property owner must seek a final determination as to alternative, *less ambitious* schemes of development." *Id.* at 1576 (emphasis added). But the Eleventh Circuit demurred:

because the record made clear that no conceivable alternative would permit the level of development alleged to be constitutionally required, the case was now ripe. In other words, where "there is no uncertainty regarding the level of development that would be permitted, *MacDonald*'s reapplication requirement serves no purpose," and the decision of the land-use agency is necessarily "final and conclusive." *Id.*

Under the reasoning of the Texas Supreme Court and of the Eleventh Circuit, Mr. Palazzolo's regulatory takings claim would have been found ripe. Similar to the property owners in *Mayhew*, Mr. Palazzolo alleged that anything less than granting him permission to fill wetlands would result in a taking. *See* Pet. App. at B–4 (Mr. Palazzolo "contended that the CRMC's rejection of his 1983 and his 1985 applications constituted a taking of his property by denying him all beneficial use of his property in violation of the United States Supreme Court's decision in *Lucas* . . . ."). To frame the allegation another way, CRMC's undisputed refusal to permit Mr. Palazzolo to fill ***any*** wetlands in and of itself worked a regulatory taking—regardless of whether Mr. Palazzolo might have obtained permission to develop one single-family home on his more than eighteen acres of coastal property. In Texas, Mr. Palazzolo would ***not*** have been "required to submit additional alternative proposals . . . to ripen [his] complaint." The same is true in the Eleventh Circuit: because there was no uncertainty regarding the level of development that would be permitted by CRMC—just one single-family home on eighteen-plus acres—*MacDonald*'s reapplication requirement would serve no purpose, and CRMC's decision would be deemed final and conclusive for purposes of ripeness.[5]

[5] In addition to the fact that Mr. Palazzolo did not seek permission for "less ambitious" development plans, the Rhode Island Supreme Court based its ripeness determination on one other "fact," namely, that "although Palazzolo claimed that his property was taken when (continued...)

This way of considering ripeness makes eminent sense. The ripeness of a takings claim should not turn on the accuracy of the property owner's allegations about the economic impact of the regulation on his property. In general, ripeness concerns "fitness for review," *Suitum*, 520 U.S. at 742; it should not be the review itself. Thus, although *Mayhew* found the case to be ripe because 3,600 homes was "the minimum number of units the Mayhews *believed* [i.e., alleged] necessary to make an economically viable use of their land," 964 S.W.2d at 931 (emphasis added), the court also found, *on the merits*, that the city's failure to approve the 3,600-unit planned development did not deprive the property of economically viable use, *see id.* at 937.

[5] (...continued)
he was *denied permission to develop a seventy-four-lot subdivision*, he never applied for permission to develop such a subdivision." Pet. App. at A–11 (emphasis added). This statement is inaccurate, to say the least. As the very first sentence of the supreme court's opinion indicates, Mr. Palazzolo actually "alleg[ed] that the CRMC's *denial of his application to fill eighteen acres of coastal wetlands* constituted a taking." Pet. App. at A–2 (emphasis added); *accord id.* at B–1 (observing that Mr. Palazzolo "claim[ed] that [CRMC's] *denial of his application to fill approximately 18 acres of wetlands* constitutes an inverse condemnation taking" (emphasis added)).

Nevertheless, this "fact" led the supreme court to conclude that because Mr. Palazzolo "has not applied for permission to develop a seventy-four-lot subdivision, he has not 'received a final decision regarding the application of the regulations to the property at issue.'" *Id.* at A–11 (quoting *Williamson County*, 473 U.S. at 186). This conclusion is a complete non sequitur. As described in the text above, the pertinent "regulations" are regulations that "prohibit the filling, removing or grading in coastal wetlands" of the very type owned by Mr. Palazzolo. Pet. App. B–3. Mr. Palazzolo's application to fill wetlands unequivocally "was denied by the CRMC on February 18, 1986." *Id.* at A–5. That denial—coupled with uncontradicted testimony that "any proposal involving the filling of wetlands would be denied," *id.* at B–5—undoubtedly constituted a "final decision" regarding application of CRMC's regulations to the property.

Likewise, although the Eleventh Circuit in *Greenbriar* found the property owner's claim to be ripe because "there was no uncertainty regarding the level of development to be permitted," 881 F.2d at 1576, the court also found, on the merits, that the Constitution did not actually require the city to permit this level of development, *see id.* at 1577-80.

In the present case, Mr. Palazzolo's allegations that the failure to permit any filling of the wetlands effected a taking under both *Lucas* and *Penn Central* may conceivably fail even under a correct view of takings law, *but see supra* Part I, *infra* Part III, but that possibility does not render the takings claim unripe. Rather, given the uncontradicted evidence that CRMC will allow no filling whatsoever, those substantive issues are fit for immediate review. When the Supreme Court of Rhode Island ruled otherwise, it created a conflict with the Supreme Court of Texas and the Eleventh Circuit. This Court should grant certiorari to resolve the conflict.

III

THE LOWER COURTS ARE ALSO IN CONFLICT AS TO WHETHER REMAINING USES OF REGULATED PROPERTY ARE ECONOMICALLY VIABLE MERELY BECAUSE THE PROPERTY RETAINS SOME VALUE

Mr. Palazzolo argued in this case that he has suffered a regulatory taking under both *Lucas* and *Penn Central*. As detailed in Part I, the Rhode Island Supreme Court erroneously rejected both of these arguments based on the "post-enactment purchaser" rule. The court also rejected the *Lucas* argument on another ground, namely, that Mr. Palazzolo's property could not have been deprived of all economically viable use because, despite the regulatory restraint, it retained a value greater than zero. In so ruling, the court below created a conflict with the Court of Appeals for the Ninth Circuit.

In *Lucas* itself, the state trial court found—and the state supreme court did not disagree—that the challenged regulatory

prohibition "rendered Lucas's parcels 'valueless.'" 505 U.S. at 1006. Thus, the Court had no occasion to flesh out what it meant by an "economically viable use," the denial of which is a "categorical" taking. *Id.* at 1015-16. *Cf. id.* at 1076 (statement of Souter, J.) (observing that "[b]ecause the questionable conclusion of total deprivation cannot be reviewed, the Court is precluded from attempting to clarify the concept of total . . . taking on which it rests"). The Rhode Island courts, however, have read *Lucas* to require that property be rendered valueless in order for a property owner to establish a categorical regulatory taking. Thus, when the court below considered whether Mr. Palazzolo "has been deprived of all beneficial and reasonable use of his land," Pet. App. at A–12, the court considered one piece of evidence—and one piece of evidence only. The supreme court concurred with the trial court that Mr. Palazzolo "had not demonstrated such a deprivation" solely on the fact that "had he developed the upland portion of the land, its value would have been $200,000" and that "the wetlands would have value in the amount of $157,500 as an open space gift." *Id.* That is, the court did not consider such things as whether the development would even be economically feasible in light of its costs, whether Mr. Palazzolo would receive a viable return on his more than four-decade-long investment in the property, or whether the residual value was economically significant in light of the $3.15 million in lost profits he has suffered.

The lower court's refusal even to consider any facts other than a nonzero residual value stands in marked conflict with the approach taken by the Ninth Circuit in *Del Monte Dunes*. There, a jury had found that the property owner had suffered a compensable regulatory taking, and the trial court had denied the city's motion for a judgment notwithstanding the verdict. The court of appeals affirmed, concluding (inter alia) that "the jury was not compelled to find that the City's actions left Del Monte with an economically viable use of [its property]." 95 F.3d at 1434. In so concluding, the Ninth Circuit expressly

rejected the argument that "because Del Monte sold the [property] to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed." *Id.* at 1432. Thus, whereas the Rhode Island courts found an economically viable use merely because Mr. Palazzolo, "unlike the plaintiff in *Lucas*," could not prove that his property was rendered valueless, Pet. App. at B–9, the Ninth Circuit upheld a finding of no economically use where the property not only retained value, but was sold for nearly a *million dollars* more than its purchase price. *See also Del Monte Dunes*, 95 F.3d at 1433 (observing that "several courts have found a taking even where the 'taken' property retained significant value"). This Court, of course, affirmed the Ninth Circuit's decision in *Del Monte Dunes*. *See* 526 U.S. 687 (1999).

Before *Lucas*, the Ninth Circuit observed that "the precise meaning of 'economically viable use of land' is elusive and has not been clarified by the Supreme Court." *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988). Because the facts of *Lucas* "precluded [the Court] from attempting to clarify the concept" of economically viable use, *Lucas*, 505 U.S. at 1076 (statement of Souter, J.), that decision did not render the concept any less elusive. *See, e.g.*, William S. Walter, *Appraisal Methods and Regulatory Takings*, 63 Appraisal J. 331, 340-41 (1995) (arguing that *Lucas* does not itself define economically viable use but rather "*portends a search* . . . for methodologies to define when a property is economically idle and denied all economically viable use" (emphasis added)). As evidenced by the conflict between the Rhode Island Supreme Court and the Ninth Circuit, that search is not bearing fruit, and the elusiveness remains. This Court should grant certiorari to bring much needed clarification to this important area of constitutional law.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: June, 2000.

Respectfully submitted,

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

JOHN B. WEBSTER
Attorney at Law
875 Centerville Road
Warwick, Rhode Island 02886
Telephone: (401) 822-1300
Facsimile: (401) 821-4188

Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

A. Opinion of the Supreme Court of Rhode Island (Feb. 25, 2000)

B. Opinion of the Superior Court of Rhode Island, Washington County (Oct. 24, 1997)

February 25, 2000

Supreme Court

No. 98-333-Appeal.
(WM 88-297)

Anthony Palazzolo :

v. :

State of Rhode Island, by and through its General Treasurer, Paul J. Tavares, et al. :

Present: Weisberger, C.J., Lederberg, Bourcier, Flanders, and Goldberg, JJ.

OPINION

Lederberg, Justice. Anthony Palazzolo (Palazzolo) brought an inverse condemnation action against the Coastal Resources Management Council (CRMC), alleging that the CRMC's denial of his application to fill eighteen acres of coastal wetlands constituted a taking of his property for which he was entitled to compensation pursuant to the United States and Rhode Island Constitutions. After a trial justice found that the denial of Palazzolo's application was not a taking for which compensation was owed, judgment was entered for the CRMC, and Palazzolo timely appealed to this Court. It is our conclusion that this case is not ripe for judicial review and that the trial justice did not err in granting judgment to the CRMC.

Facts and Procedural History

Palazzolo has been president of Shore Gardens, Incorporated (SGI), a Rhode Island corporation, from the time of its incorporation on July 29, 1959. On December 2, 1959, Palazzolo, Natale Urso (Urso), and Elizabeth Urso transferred three adjoining parcels of land in the Town of Westerly, Rhode Island, (town) to SGI. The parcels are located between the northern side of Atlantic Avenue and the southern shore of Winnipaug Pond. In 1936, an earlier owner had subdivided that portion of the land lying along Atlantic Avenue, leaving the remainder as an undivided lot. In 1959, SGI submitted to the town a new plat subdividing the entire property into eighty lots. At the time, Palazzolo and Urso were the sole shareholders in SGI. Between 1959 and 1961, SGI transferred for consideration eleven of the lots to various grantees. These lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land. In 1960, Urso transferred his interest in SGI to Palazzolo, and Palazzolo became the sole shareholder. In 1969, five of the previously sold lots were reacquired by SGI. After this transaction, SGI was the record owner of seventy-four of the original eighty lots. Although

SGI's corporate charter was revoked by the Rhode Island Secretary of State on February 27, 1978, SGI remains the record owner, and all taxes on the property are assessed to SGI.

The property consists primarily of coastal wetlands and marshlands.[1] Some of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.

Between 1962 and 1985, Palazzolo filed several applications with state agencies seeking permission to substantially alter the property. During the same period, state regulations governing alterations to coastal wetlands changed substantially. On March 29, 1962, Palazzolo submitted an application to the Division of Harbors and Rivers (DHR) of the Department of Natural Resources (DNR)[2] to dredge the pond and use the dredge to fill the subject property. This application was returned to Palazzolo by DHR because it lacked essential information. On May 16, 1963, Palazzolo filed an application seeking approval to build a bulkhead, to dredge the pond, and to fill the property. At the time of these two applications, there was no statutory requirement that any state agency approve the

---

[1] The exact size of the entire parcel has not been specified by the parties. It is undisputed that the property comprises approximately eighteen acres of wetland, and it appears that there are no more than a few additional upland acres.

[2] At the time of Palazzolo's 1962 and 1963 applications, DHR was part of the Department of Public Works. In 1965, however, the Legislature transferred DHR to the newly-created DNR. P.L. 1965, ch. 137, §1. For purposes of clarity, we will refer to DNR throughout this opinion.

filling of coastal wetlands, but a party wishing to dredge a river or pond was required to gain approval of DHR.[3]

In 1965, the Legislature adopted an act on inter-tidal wetlands protection that gave DNR[4] the authority to restrict filling in coastal wetlands. P.L. 1965, ch. 140, §1, codified as G.L. 1956 §§ 2-1-13 through 2-1-17.[5] On April 29, 1966, Palazzolo applied for DHR approval to dredge the pond and fill the tidal marshlands so he could construct a recreational beach facility, and on April 1, 1971, DHR issued a decision approving the applications and giving Palazzolo the option of either constructing a bulkhead and filling the marsh or constructing a beach facility. On November 17, 1971, DHR revoked its assent, and this revocation was not appealed.

In 1971, the Legislature enacted the Coastal Resources Management Council enabling act, P.L. 1971, ch. 279, § 1, codified as G.L. 1956 chapter 23 of title 46, which created the CRMC and gave the CRMC authority to regulate coastal wetlands. In 1977, the CRMC promulgated a set of regulations —the Coastal Resources Management Program—that prohi-

---

[3] Neither party has identified any statutory provision that required DHR approval before a pond or river could be dredged, although both parties agreed that Palazzolo was required to seek such approval. We will assume that DHR had authority to consider these applications, although the question is purely of historical interest at this point.

[4] This act ostensibly gave authority over coastal wetlands to the Department of Agriculture and Conservation. P.L. 1965, ch. 140, § 1. Nearly simultaneously, however, the Legislature transferred all of the functions, powers, and duties of the Department of Agriculture and Conservation to DNR. P.L. 1965, ch. 137, § 1.

[5] This act was repealed in 1990. P.L. 1990, ch. 461, § 9. Well before this repeal, the state had delegated authority over coastal wetlands to the CRMC.

bited the filling of coastal wetlands without a special exception from the CRMC.

In March 1983, Palazzolo filed an application with the CRMC seeking approval to construct a bulkhead on the shore of the pond and fill approximately eighteen acres of salt marsh. That application, nearly identical to the application submitted in 1963, was rejected by the CRMC. Palazzolo did not appeal that decision. In January 1985, Palazzolo filed an application to fill wetlands on the property, again so he could create a recreational beach facility. This application, nearly identical to the 1966 application, was denied by the CRMC on February 18, 1986. Palazzolo appealed this denial pursuant to G.L. 1956 § 42-35-15, and that appeal was denied by a justice of the Superior Court. *Palazzolo v. Coastal Resources Management Council*, 1995 WL 941370 (R.I. Super., Jan. 5, 1995) (C.A. No. 86-1496) (Israel, J.).

While Palazzolo's appeal of the 1986 CRMC decision was proceeding, he filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation, in violation of the Fifth Amendment to the United States Constitution and Article 1, section 16, of the Rhode Island Constitution. Palazzolo sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes. A jury-waived trial was held in June 1997, and on October 24, 1997, the trial justice issued a thirteen-page decision that made findings of fact and law. The trial justice concluded that Palazzolo's property had not been taken for public use and that no compensation was required under the United States or Rhode Island Constitutions. Palazzolo timely appealed, asking this Court to review the trial justice's findings of fact and law.

Additional facts will be discussed as required by analysis of the legal issues presented.

Standard of Review

Palazzolo's appeal seeks review of the findings of law and the findings of fact made by the trial justice in his decision. A trial justice's findings on questions of law are reviewed *de novo* by this Court. *See, e.g., Nonnenmacher v. City of Warwick*, 722 A.2d 1199, 1202 (R.I. 1999) (the existence of a contract is a question of law reviewed *de novo* by the Court); *Levine v. Bess Eaton Donut Flour Co.*, 705 A.2d 980, 982 (R.I. 1998) (statutory interpretation is a question of law that the Court reviews *de novo*).

Findings of fact by a trial justice sitting without a jury, however, are accorded great weight upon review by this Court, and those factual determinations "will not be disturbed unless the justice has overlooked or misconceived material evidence or was otherwise clearly wrong." *State v. Collins*, 679 A.2d 862, 865 (R.I. 1996).

A trial justice's findings on mixed questions of law and fact are generally entitled to the same deference as the justice's findings of fact. *Hawkins v. Town of Foster*, 708 A.2d 178, 182 (R.I. 1998). But, when those mixed questions of law and fact impact constitutional matters, we shall review the findings *de novo*, pursuant to *Ornelas v. United States*, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996). *See Foley v. Osborne Court Condominium*, 724 A.2d 436, 439 (R.I. 1999) (applying the *Ornelas* standard to a civil case); *State v. Campbell*, 691 A.2d 564, 569 (R.I. 1997) (applying the *Ornelas* standard to a criminal case).

Takings Analysis

Palazzolo's claim for damages is grounded in the Fifth Amendment to the United States Constitution, which bars the taking of private property for public use, without just compensation.

This prohibition on uncompensated taking has been applied to the states through the Fourteenth Amendment. *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621, 623 n.1, 101 S. Ct. 1287, 1289 n.1, 67 L. Ed. 2d 551, 555 n.1 (1981). Similarly, article 1, section 16, of the Rhode Island Constitution provides that "[p]rivate property shall not be taken for public uses, without just compensation." The United States Supreme Court has recognized that this constitutional injunction is "designed to bar [g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49, 80 S. Ct. 1563, 1569, 4 L. Ed. 2d 1554, 1561 (1960).

Historically, a taking was recognized when the government confiscated a piece of real property for some public purpose, such as constructing a road. *See, e.g., Central Land Co. v. City of Providence*, 15 R.I. 246, 250, 2 A. 553, 556 (1886) (city required to give compensation for land taken to widen road). The United States Supreme Court has also recognized, however, "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326 (1922). The question of whether a specific governmental regulation of property has gone too far, however, has not been an easy one to resolve. *See Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-28, 98 S. Ct. 2646, 2658-61, 57 L. Ed. 2d 631, 647-51 (1978) (discussing the difficulties in developing a "set formula" to analyze regulatory takings claims). Fortunately, recent decisions of the Supreme Court have identified a three-step process that can be used in analyzing Palazzolo's regulatory takings claim.

First, a court confronted with a claim that a government regulation effects a taking of property must determine whether the claim is ripe for judicial review. *See, e.g., MacDonald,*

Sommer & Frates v. County of Yolo, 477 U.S. 340, 351-52, 106 S. Ct. 2561, 2567-68, 91 L. Ed. 2d 285, 295-97 (1986) (court should not reach the merits of a takings claim if the claim is premature); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126, 139 (1985) (judicial action on a takings claim is not supportable when the claim is not ripe). The United States Supreme Court in *Williamson County* has stated that a regulatory takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Id.*

Second, if the claim is ripe, the reviewing court must then determine whether the government regulation falls into one of the two categories that the Supreme Court has identified as *per se* takings. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798, 812-13 (1992). The first of these is any regulation that compels a property owner to suffer a physical invasion of his or her property. *Id.* at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812. *See also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435-40, 102 S. Ct. 3164, 3175-78, 73 L. Ed. 2d 868, 882-85 (1982) (regulation requiring building owner to permit cable television company to install equipment on the exterior of the building was a compensable taking, regardless of the size of the equipment). The second category of *per se* takings occurs when the regulation at issue "denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 813. *See also Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140 (R.I. 1983) (town was required to compensate landowner after designating property as being in "high flood danger" district, because the designation left owner with no beneficial use of the property). Hence, when government action constitutes either a physical invasion of property or a denial of all beneficial use, the owner of the property must be

compensated regardless of the public interest advanced in support of the action. *Lucas*, 505 U.S. at 1015, 112 S. Ct. at 2893, 120 L. Ed. 2d at 812.

Finally, when a regulation does not amount to a *per se* taking, the reviewing court must determine whether it meets the test for a regulatory taking established in *Penn Central*, 438 U.S. at 124, 98 S. Ct. at 2659, 57 L. Ed. 2d at 648. This test requires an *ad hoc* factual inquiry in which the court should examine three factors. *Id.* First, what is the character of the government action? *Id.* Second, what is the economic impact of the action? *Id.* Third, to what extent has the regulation interfered with distinct investment-backed expectations of the owner? *Id. See also Alegria v. Keeney*, 687 A.2d 1249, 1252 (R.I. 1997) (applying the *Penn Central* test).

In our review, we begin by applying this three-step analysis to evaluate Palazzolo's claim that the CRMC's denial of his application to fill his property amounts to a compensable taking. We first discuss the necessary question of whether the claim is ripe for judicial review.

Ripeness

The requirement of ripeness is based on the principle that this Court "will not render advisory opinions or function in the abstract." *Rhode Island Ophthalmological Society v. Cannon*, 113 R.I. 16, 28, 317 A.2d 124, 130-31 (1974). The United States Supreme Court discussed the basic rationale of the ripeness doctrine in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 1515, 18 L. Ed. 2d 681, 691 (1967), in which the Court explained that unless administrative decisions resulted in cases that were ripe for judicial resolution, courts would become enmeshed in "abstract disagreements" concerning administrative policies. *See also Barrington School Committee v. Rhode Island State Labor Relations Board*, 608 A.2d 1126, 1131 (R.I. 1992) ("the need for exhaustion to attain ripeness allows an agency to correct its own errors, perhaps thereby

avoiding the necessity of any judicial involvement"). A case is ripe for review only when there is an allegation of an injury in fact and when the claims that are made are capable of proof at trial. *Cannon*, 113 R.I. at 28, 317 A.2d at 130-31. *See also In re Petition of Almond*, 603 A.2d 1087, 1090 (R.I. 1992) (petition regarding potential conflict between state and federal rules governing prosecutors' conduct was not ripe for review where the federal court had adopted the state rule, because federal prosecutors would face injury only if federal court abandoned state rule); *Vose v. Rhode Island Brotherhood of Correctional Officers*, 587 A.2d 913, 915 n.2 (R.I. 1991) (case was ripe for review when there was actual conflict between statute and collective bargaining agreement).

The concept of ripeness looms large in the jurisprudence of takings because for a court to determine whether a taking has occurred, the court must be able to ascertain "the nature and extent of permitted development" on the subject property. *MacDonald, Sommer & Frates*, 477 U.S. at 351, 106 S. Ct. at 2567, 91 L. Ed. 2d at 295. Thus, a claim was found not to be ripe when the claimants had not submitted a plan for development of the property. *See Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 2141, 65 L. Ed. 2d 106, 111 (1980) (owners alleged that zoning change was a taking, but had not sought permission to develop the land). Similarly, claims were deemed unripe when the claimants had submitted only a single grandiose plan for development and had not demonstrated that less ambitious plans also would be rejected. *See MacDonald, Sommer & Frates*, 477 U.S. at 353 n.9, 106 S. Ct. at 2568 n.9, 91 L. Ed. 2d at 297 n.9 (owner only had sought approval for a 159-lot development and did not explore options for less intensive development); *Penn Central*, 438 U.S. at 136-37, 98 S. Ct. at 2665-66, 57 L. Ed. 2d at 656 (owner had only sought approval to build fifty-story building above train terminal and did not demonstrate that permission would be denied for smaller structure); *Alegria*, 687 A.2d at 1253 (claimant

filed application to construct four buildings in wetlands, but never sought approval for construction of fewer buildings).

On the basis of our *de novo* review of the record and of the trial justice's decision, it is our determination that Palazzolo's claim for compensation was not ripe for review. This holding is derived from two crucial facts. First, although Palazzolo claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision. His 1966 and 1985 applications sought to fill the wetlands so he could construct a beach club. His 1963 and 1983 applications sought permission to fill the wetlands, with no statement describing what he intended to do with the land when it was filled. In fact, during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land. Because Palazzolo has not applied for permission to develop a seventy-four-lot subdivision, he has not received a "final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186, 105 S. Ct. at 3116, 87 L. Ed. 2d at 139.

Our conclusion that Palazzolo's claim is not ripe for judicial resolution also rests on the fact that he has not sought permission for less ambitious development plans. His 1963 and 1983 applications sought permission to fill the entire eighteen acres of wetlands. His 1966 and 1985 applications to develop a private beach club sought permission to fill all of the wetlands except for a fifty-foot strip between the fill and the pond. Palazzolo has not sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel. There was undisputed evidence in the record that it would be possible to build at least one single-family home on the existing upland area, with no need for additional fill. Until Palazzolo has explored development options less grandiose than filling eighteen acres of salt marsh, he cannot maintain a claim

that the CRMC has deprived him of all beneficial use of the property.[6]

Because Palazzolo's regulatory takings claim was not ripe for judicial review, the trial justice properly entered judgment in favor of the CRMC. Although our determination that the claim was not ripe is dispositive of the case, we shall briefly discuss the merits of Palazzolo's claim.

Deprivation of All Beneficial Use

The trial justice properly began his consideration of Palazzolo's claim by examining whether there had been a *per se* taking under the rubric of *Lucas*. Because both parties acknowledged that the regulations in question did not compel Palazzolo to suffer a physical invasion of his property, there could only be a *per se* taking if Palazzolo has been deprived of all beneficial and reasonable use of his land. The trial justice found that Palazzolo had not demonstrated such a deprivation. Based on our *de novo* review of the record, we agree.

Palazzolo presented evidence at trial indicating that he would not be granted permission to fill eighteen acres of wetlands on the subject property. There was undisputed evidence; however, that had he developed the upland portion of the land,

[6] This holding leads to the self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained. We emphasize, however, that those subsequent applications must be substantially different from the original application. In the case at bar, Palazzolo repeatedly filed nearly identical applications to fill the wetlands, and appealed only one of the three denials of these applications. The doctrine of administrative finality dictates that an applicant may not challenge administrative action by filing identical repetitive applications, but must bring any challenge in Superior Court in accord with the Administrative Procedures Act, G.L. 1956 § 42-35-15.

its value would have been $ 200,000. Further, there was testimony that the wetlands would have value in the amount of $157,500 as an open-space gift. It is true that these sums are significantly lower than the speculative $3,150,000 profit that Palazzolo alleged he could earn from filling and developing the wetlands,[7] but "[t]he mere fact that [the landowner] may not have received the anticipated return on his investment does not render nugatory the remaining value of the land." *Alegria*, 687 A.2d at 1253. In the face of this evidence, the trial justice was not clearly wrong in finding that Palazzolo had not been deprived of all beneficial use of his property.

Even if Palazzolo had been denied all beneficial use of his property, he would not be able to demonstrate a *per se* taking on the facts of this case. In *Lucas*, the Supreme Court noted that the government "may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his [or her] title to begin with." *Lucas*, 505 U.S. at 1027, 112 S. Ct. at 2899, 120 L. Ed. 2d at 820. In applying this rule, the trial justice found that Palazzolo could not have become the owner of the property before 1978, at which time the regulations limiting his ability to fill the wetlands were already in place. The trial justice thus determined that the right to fill the wetlands was not part of Palazzolo's estate to begin with, and that he was therefore not owed any compensation for the deprivation of that right. The trial justice's finding that Palazzolo did not acquire the parcel until 1978 is a mixed question of law and fact that does not implicate constitutional matters. We will not overturn

[7] It was revealed at oral argument that the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres. Further, there was no evidence that Palazzolo would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require. Thus, it is clear that his anticipated "profit" was unrealistically optimistic.

that finding unless there was "clear error, oversight, or misconception of material evidence." *Hawkins*, 708 A.2d at 182. However, the trial justice's determination that a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property is a question of law that we review *de novo*. In making these findings, the trial justice did not overlook or misconceive any material evidence, nor did he misapply the law.

During trial, the trial justice described the conveyance history of this parcel as "a title examiner's nightmare." The evidence was clear, however, that in 1959 the land was acquired by SGI, not Palazzolo. Further, all transactions since 1959 have been conducted and recorded in the name of SGI. During the time that SGI was a valid Rhode Island corporation, SGI was clearly the owner of this property, despite the fact that Palazzolo was SGI's sole shareholder for most of that time. *See Rhode Island Hospital Trust Co. v. Doughton*, 270 U.S. 69, 81, 46 S. Ct. 256, 258, 70 L. Ed. 475, 479 (1926) ("[t]he owner of the shares of stock in a company is not the owner of the corporation's property"). *See also Brotherton v. Department of Environmental Conservation*, 675 N.Y.S.2d 121, 122 (N.Y. App. Div. 1998) (having "received the benefits of corporate ownership for many years * * * [claimant] may not now disregard the corporate form of ownership merely because it no longer serves his interests"); *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 418 (Va. 1998), *cert. denied*, 119 S. Ct. 73, 142 L. Ed. 2d 57, 67 U.S.L.W. 3001 (U.S. Va. Oct. 5, 1998) (No. 97-2061) (corporation, not stockholder, was owner of property for purposes of takings analysis). Palazzolo did not become the owner of the property until 1978 because only at the time the corporation's charter was revoked did the property pass by operation of law to Palazzolo, its sole shareholder. *Friendly Home v. Shareholders & Creditors of Royal Homestead Land Co.*, 477 A.2d 934, 938 (R.I. 1984). Thus, there was sufficient

evidence to support the trial justice's finding that Palazzolo did not become the owner of the parcel until 1978.[8]

Palazzolo argued that if in fact he became deprived of all beneficial use of the land, then under *Lucas* it is irrelevant *when* he became owner of the property. Under his reasoning, if a regulation deprives an owner of all beneficial use, it is immaterial whether the regulation predates the claimant's ownership of the land. However, Palazzolo was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property *after* the regulation became effective. Not only is this argument unsupported by precedent, it is flawed. First, it violates the Supreme Court's dictate in *Lucas* instructing reviewing courts to determine whether a landowner originally possessed the right to engage in a particular use. Here, when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired. *See Brotherton*, 675 N.Y.S.2d at 122-23 (takings claim failed because "[the landowner] failed to demonstrate that, at the time he acquired title, he possessed the right to develop and use the property in the manner which he proposes"); *City of Virginia Beach*, 498 S.E.2d at 417 (where the regulation predated the landowner's acquisition of the property, "the 'bundle of rights' which [the landowner] acquired upon obtaining title to the

---

[8] Had SGI sought compensation for a taking during its ownership of the property, it would have been faced with the fact that it would not have been able to demonstrate deprivation of all beneficial use, because it had transferred eleven parcels for consideration during the first three years of its ownership. *See Ciampitti v. United States*, 22 Cl. Ct. 310, 320 (1991) (in determining whether there had been deprivation of all beneficial use, court must "put into the equation not only those areas as to which dredge and fill permits were denied, but also those areas that had been successfully developed earlier").

property did not include the right to develop the lots without restrictions").

Moreover, Palazzolo's argument that the time of acquisition is irrelevant could lead to pernicious "takings claims" based on speculative purchases in which an individual intentionally purchases land, the use of which is severely limited by environmental restrictions, and then seeks compensation from the state for that "taking." Additionally, regulatory takings would be treated differently from physical takings, a result that is clearly contrary to the *Lucas* Court's statement that the two types of takings should be accorded similar treatment by courts. *Lucas*, 505 U.S. at 1028-29, 112 S. Ct. at 2900, 120 L. Ed. 2d at 821. For instance, under Palazzolo's interpretation, any new purchaser of land would be able to claim that a pre-existing regulation resulted in a taking for which that new owner was owed compensation. This is clearly different from the treatment given to physical takings, in which only the owner at the time of the taking is owed compensation. *See id.* (noting that "a permanent easement that was a pre-existing limitation upon the landowner's title" would not amount to a compensable taking). Regardless of whether the government physically takes property in the form of an easement or promulgates regulations restricting the property's use, all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner.

Thus, the record here provided sufficient evidence to support the trial justice's findings that Palazzolo had not been deprived of all beneficial use of his property and that he had no inherent development rights derived from any rights that existed prior to his acquiring title to the land in 1978. Therefore, there was no *per se* taking.

Investment-Backed Expectations

Having concluded that there was no *per se* taking, we must determine whether there was a regulatory taking under the test of *Penn Central*. The trial justice found that Palazzolo had no reasonable investment-backed expectations that were affected by this regulation and that therefore there was no taking. We agree. As we have discussed, the trial justice did not err in finding that Palazzolo did not become the owner of the land until 1978.[9] At that time, there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development.

In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision. *See Good v. United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999), *petition for cert. filed*, 68 U.S.L.W. 3367 (U.S. Nov. 24, 1999) (No. 99-881) ("[i]n view of the regulatory climate that existed when [the landowner] acquired the subject property, [the landowner] could not have had a reasonable expectation that he would obtain approval to fill ten acres of wetlands in order to develop the land").

Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case, and we need not consider the other factors of the *Penn Central* test. *Good*, 189 F.3d at 1363.

---

[9] During oral argument it was suggested that a party to whom property passes through operation of law could assume the investment-backed expectations of the original owner, and we were referred to the decision in *Reahard v. Lee County*, 968 F.2d 1131 (11th Cir. 1992). The Eleventh Circuit in *Reahard* never decided the issue of whether the claimant, who had inherited the property from his parents, had any reasonable investment-backed expectations, *id.*, at 1136, and the action was ultimately dismissed for lack of ripeness. *Reahard v. Lee County*, 30 F.3d 1412, 1418 (11th Cir. 1994).

Conclusion

In conclusion, therefore, Palazzolo's claim was not ripe for review, he has not demonstrated that he has been deprived of all beneficial use of his property, and he had no reasonable investment-backed expectations that he could develop a seventy-four-lot subdivision on this property. Therefore, the judgment of the Superior Court is affirmed, and Palazzolo's appeal is denied and dismissed. The papers of the case may be returned to the Superior Court.

FILED: OCTOBER 24, 1997

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, SC SUPERIOR COURT

ANTHONY PALAZZOLO, individually and as successor in the title to SHORE GARDENS, INC.,	:	
v.	:	C.A. No. 88-0297
COASTAL RESOURCES MANAGEMENT COUNCIL, ET AL.	:	

DECISION

WILLIAMS, J. Before the Court is the plaintiff's, Anthony Palazzolo ("plaintiff"), claim that the Coastal Resources Management Council's ("CRMC") denial of his application to fill approximately 18 acres of wetlands off Atlantic Avenue in Westerly, Rhode Island, constitutes an inverse condemnation taking. Specifically, the plaintiff contends that the CRMC's actions violated the Fifth Amendment's just compensation clause as incorporated by the Due Process Clause of the Fourteenth Amendment and violated Article I § 16 of the Constitution adopted December 4, 1986. Jurisdiction is pursuant to G.L. 1956 § 8-2-14.

FACTS and TRAVEL [sic]

The subject property consists of approximately 74 lots and is located adjacent to Winnapaug Pond in Westerly, Rhode Island. On December 1, 1959, the plaintiff purchased an undivided one-half interest in the majority of the subject property from Natale Louis and Elizabeth D. Urso ("Ursos") for approximately $8,000 (Plaintiff's Exhibit 1). On December 2, 1959, the plaintiff and Ursos transferred the same property to Shore Gardens, Inc. (SGI), a Rhode Island Corporation (Plaintiff's Exhibit 1). The plaintiff was president of SGI from July 29, 1959, the date of incorporation, until February 27, 1978, when SGI's Charter was revoked. On May 15, 1969, SGI acquired, by Warranty Deed, the remainder of the subject property for a purchase price of approximately $5,000 (Plaintiff's Exhibit 2). Between 1959 and 1961 SGI sold six parcels to various parties who constructed homes on them. (Defendants' Exhibit OO-TT.) On March 29, 1962, the plaintiff submitted an application to the State of Rhode Island Department of Natural Resources, Division of Harbors and Rivers (DHR) to dredge Winnapaug Pond and to use the dredge to fill marsh on the subject property to make it "adaptable for useful development." (Plaintiffs Exhibit 14, Decision of the Chief of the DHR at 1.) The application was returned to the plaintiff because it was missing essential information. On May 16, 1963, the plaintiff submitted a second application to DHR seeking state approval to build a bulkhead on the subject property, to dredge Winnapaug Pond, and to use the material as fill on the subject property. On April 29, 1966, the plaintiff submitted (without prejudice) a third application to DHR in which the plaintiff proposed to dredge Winnapaug Pond and dispose of the dredged material in tidal marshlands located on the subject property in order to construct a recreational beach facility. On April 1, 1971, the DHR issued a decision approving the plaintiff's applications and giving the plaintiff the option to elect either the plan to construct a bulkhead and fill the salt marsh or

the plan to construct a recreational beach facility and fill the salt marsh. On November 17, 1971, the DHR revoked its assent. The plaintiff did not appeal.

In 1971 the CRMC succeeded the DHR as the regulator of coastal wetlands. (Testimony of Grover Fugate, R.I. Gen. Laws § 46-23-1, *et seq.*) In 1976 the CRMC adopted the Coastal Resources Management Plan (CRMP) which prohibited the filling of coastal wetlands without a special exception. In June 1983 the CRMC revised the CRMP to prohibit the filling, removing or grading in coastal wetlands adjacent to Type 1 and 2 waters "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms." (CRMP 300.2.B(1)). The subject property is adjacent to Type 1 waters.

In March 1983 the plaintiff filed an application with the CRMC to construct a bulkhead, on the shoreline of Winnapaug Pond and to fill approximately 18 acres of salt marsh on the subject property. The 1983 application was nearly identical to the application the plaintiff submitted to DHR in 1962. The CRMC denied the plaintiff's application and he did not appeal that decision. (Plaintiff's Exhibit 14, CRMC Decision, Docket No. 83-3-55.) In January 1985 the plaintiff filed a second application with the CRMC to construct a recreational beach facility and to fill wetlands adjacent to Winnapaug Pond. (Defendants' Exhibit 1, CRMC Recommendations of Subcommittee, Docket No. 85-1-33.) The 1985 application was nearly identical to the application the plaintiff submitted to DHR in 1966. The CRMC denied the 1985 application. On June 15, 1988, the plaintiff filed the instant action alleging that the CRMC's denial of his application constituted a taking of his property without just compensation.

The plaintiff contended that SGI was not the true owner of the subject property, even though it held title to the subject property since December 2, 1959, and May 15, 1969. The

plaintiff argued that he was the owner of the subject property, because he had acquired 100 percent of SGI's stock in 1961. The plaintiff further argued that because a single-family dwelling or a recreational beach facility was the only permissible use for the subject property, the CRMC's approval of one of his two applications was necessary to enable him to obtain *some* use of his property. The plaintiff also contended that the CRMC's rejection of his 1983 and his 1985 applications constituted a taking of his property by denying him all beneficial use of his property in violation of the United States Supreme Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and the Rhode Island Supreme Court's decision inn *Annicelli v. Coastal Resources Management Council*, 463 A.2d 133 (R.I. 1983).

The CRMC contended that its denial of the plaintiff's application to fill approximately 18 acres of coastal wetlands was not a taking because the plaintiff failed to present a more moderate, less damaging, more environmentally compatible alternative. Therefore, the CRMC argued, the plaintiff could not contend that he had been deprived of all beneficial use of his property. The state also asserted that the plaintiff's claim was not ripe because he had failed to specify in his application that he intended to develop a residential subdivision. Alternatively, the CRMC contended that the plaintiff could not claim that *his* property was taken because SGI was the true owner of the subject property at the time of the alleged taking. In addition, the CRMC contended that even if the plaintiff had title to the subject property, he did not acquire it until 1978 when the Secretary of State revoked SGI's Certificate of Incorporation and SGI lost its corporate status. The CRMC maintained that because the plaintiff took title of the property subject to the regulations which existed in 1986, at the time of the alleged taking, the plaintiff had no expectation to develop his property in contravention of those regulations. Moreover, the state argued that even if the CRMC's regulations did deny the plaintiff loss

of all beneficial use of the subject property, the state did not have to compensate the plaintiff because of the common law nuisance doctrine. The state raised numerous additional arguments including statute of limitations, the public trust doctrine, and lack of damages.

At trial, the plaintiff testified that the CRMC informed him that any proposal involving the filling of wetlands would be denied. Several witnesses testified that the site at the eastern end of Shore Gardens Road was developable. Grover Fugate, the Director of CRMC, and Steven Clarke, a professional engineer, testified that the CRMC would have approved the eastern end of Shore Gardens Road as a home site. The state's witness, Mr. Andolfo, testified that the value of the subject property located at the eastern end of Shore Gardens Road would be approximately $200,000 if developed. The plaintiff did not contradict this evidence. The plaintiff submitted an appraisal report which noted that the subject property had a value of $157,500 as an open-space gift.

TAKINGS ANALYSIS

The Takings Clause of the Fifth Amendment to the United States Constitution made applicable to the states through the Fourteenth Amendment and Article I, § 16 of the Rhode Island Constitution provides that private property shall not be taken for public use without just compensation. Under these provisions, when the government's interference with an individual's private property rights reaches so far as to constitute a taking, the government must compensate the individual for the interference. *Brunelle v. Town of South Kingstown*, No. 95-489-A., Slip Op. at 13 (R.I. filed July 31, 1997).

The plaintiff contends that the CRMC's actions constituted a taking under the Fifth Amendment to the United States Constitution and under Article I, § 16 of the Rhode Island Constitution. The plaintiff cites *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2882 (1992) and *Annicelli v. Town of South*

Kingston, 463 A.2d 133 (R.I. 1983) for the proposition that a landowner whose land is deprived of all economically viable use is entitled to compensation.

In *Lucas*, the landowner brought two residential lots on a South Carolina barrier island with the intention of building single-family homes. 505 U.S. 1003, 1009, 112 S. Ct. 2886, 2889. Two years later the state Legislature enacted a law which barred the landowner from erecting any permanent habitable structures on the parcels. *Id.* The United States Supreme Court found that the ban on construction had deprived the landowner of all economically viable use of his property, and therefore, effected a taking of his property requiring the payment of just compensation unless the state could prove the plaintiffs proposal constituted a common law nuisance, 505 U.S. at 1030-1031, 112 S. Ct. at 2901-2902. The *Lucas* holding was limited to the "relatively rare situations" where "no productive or economically beneficial use is permitted." 112 S. Ct. 2886, 2894, 505 U.S. 1016, 1018.

In *Annicelli*, the landowner signed a purchase-and-sales agreement to purchase real estate for the purpose of constructing a single-family dwelling. 463 A.2d 133, 135. Three weeks after the agreement was signed, the town council adopted amendments which created an HFD zone and prohibited building residential dwellings in that zone. *Id.* Under the amendment, *Annicelli's* property was in an HFD zone. *Id.* The Rhode Island Supreme Court noted that the evidence in the record showed that the plaintiff did not have *any* use of her property and that an award of compensation was appropriate. 463 A.2d at 140. (Emphasis added.) As in *Lucas*, the court awarded compensation because it found that the property, had lost "all reasonable or beneficial use." 463 A.2d 133, 141.

Under either *Lucas* or *Annicelli*, the plaintiff has the burden of proving that he had lost "all reasonable or beneficial use" of his property in order to prevail in his claim for compensation.

However, the plaintiff's failure to prove that the government regulation denied him all economically beneficial use of his property does not necessarily preclude his recovery. *Brunelle*, Slip Op. at 13. The *Brunelle* court also noted a situation which "Involves those instances in which governmental regulations, although not denying a property owner all economic benefit from his or her land, nonetheless substantially serve to reduce the economic value of the landowner's property." Slip Op. at 14. The Rhode Island Supreme Court noted that when the government regulation is derived from the state's general police powers, the court should examine "the economic impact of the regulation on the claimant and * * * the extent to which the regulation has interfered with distinct investment-backed expectations, to determine if compensation must be paid." *Brunelle*, Slip. Op. at 14 (quoting *Lucas*, 505 U.S. at 1019 n.8, 112 S. Ct. at 2895 n.8, 120 L. Ed. 2d at 815 n.8 (quoting *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124, 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631, 648 (1978)).

The ownership of property creates a "bundle of rights" including the right to possession, to exclude others, to use and enjoy, and to dispose of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). The economic impact of the regulatory scheme is determined by viewing its effect on that bundle. In *Lucas*, the Court noted that the state "may resist compensation only if the logically antecedent inquiry into the nature of owner's estate shows that the proscribed use interest were not part of his title to begin with." 505 U.S. at 1028, 112 S. Ct. at 2886. Moreover, under *Penn Central*, the court considered "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. 103, 124, 98 S. Ct. 2646, 2659. The plaintiff contends that he has been the owner of the subject property since 1961. However, the evidence at trial and general corporate law principles demonstrate otherwise. On December

1, 1959, the plaintiff purchased an undivided one-half interest in the majority of the subject property. On December 2, 1959, the plaintiff and the Ursos transferred that property to SGI. Therefore, as of December 2, 1959, SGI was the title owner of the subject property until it transferred that title to a new owner. On May 15, 1969, SGI acquired Lots 3-7 of the subject property. SGI transferred title to six parcels of the subject property to various parties between 1959 and 1961 and retained title to the remainder of the subject property. In 1978, SGI's corporate status was revoked.

The plaintiff correctly states that when a private business corporation ceases to exist its property passes by operation of law to its stockholders. (Plaintiff's Brief at 21 (citing *Friendly Homes v. Shareholders & Creditors*, 474 A.2d 934 (R.I. 1984))). The plaintiff also correctly notes that when the Secretary of State revokes a corporation's charter, the corporate assets pass to the stockholders. *Id.* However, the plaintiff incorrectly concludes that because he was SGI's sole stockholder as of 1960, he owned SGI's assets that included the subject property. According to corporate law principles, an owner of all or a majority or the stock of a validly formed corporation does not own the property of the corporation. *Rhode Island Hospital Trust Company v. Doughton, Commissioner of Revenue of North Carolina*, 270 U.S. 69, 81, 46 S. Ct. 256, 258 (1926). This rule is based on the theory that a corporation is a separate entity from its shareholders. Vol. 12B, William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* sec. 5517 (Perm. ed. 1993). Therefore, this Court finds that the plaintiffs as the sole stockholder of SGI was not the owner of the subject property until 1978, when the Secretary of State revoked SGI's corporate status.

Determination of when a landowner obtains title to property in a takings case is necessary for determination of the "bundle of rights" that the landowner owned at the time of the taking. In the instant matter, the plaintiff took title to the property in 1978, which was seven years after the CRMC wetland regulations had been promulgated. Since 1971, the CRMC has had the authority to regulate coastal wetlands. Rhode Island Gen. Laws § 46-23-1, *et seq.* In 1972, Congress enacted the Federal Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.*, which required CRMC to implement regulations for the protection of coastal wetlands. Finally, in 1976, the CRMC adopted the Coastal Resources Management Plan which prohibits the filling of coastal wetlands without a special exception. Because the plaintiff obtained title to the subject property in 1978, and because the regulations that prohibited the filling of wetlands were in place at that time, the plaintiff cannot prevail in his claim that the CRMC's actions constituted a categorical taking of his property when it denied the plaintiffs 1985 application to fill wetlands on the subject property.

Moreover, the facts on the instant matter are clearly distinguishable from those set forth in *Lucas* relied upon by the plaintiff. In Lucas, the plaintiff purchased the subject property two years *before* the passage of the regulations that denied him of all beneficial use of his property. 112 S. Ct. 2886, 2889, 505 U.S. 1003, 1009. In the instant matter, the regulations were in place approximately two years *before* the plaintiff acquired title to the property and approximately seven years before the plaintiff submitted his first application to the CRMC in 1983. Furthermore, unlike the plaintiff in *Lucas*, the plaintiff in the instant matter failed to prove that he was denied all beneficial use of the subject property. At trial, several witnesses testified that the site at the eastern end of Shore Gardens Road was developable. The state's witness, Mr, Adolfo, testified that, if developed, the value of the subject property on the eastern end of the Shore Gardens Road would be approximately $200,000. Grover Fugate, the director of CRMC, and Steven Clarke, a professional engineer, testified that the CRMC would have approved the site at the end of the road as a home site. In addition, as an open-space gift the property's value would be

approximately $157,500. The above evidence was uncontradicted. Our Supreme Court noted in *Allegria*, "the mere fact that the plaintiff may not have received the anticipated return on his investment does not render nugatory the remaining value of the land." *Allegria*, 687 A.2d 1249 (quoting *Annicelli*, 463 A.2d 133, 140). Accordingly, the evidence before this Court demonstrates that the plaintiff did not lose all beneficial use of the subject property.

In addition even assuming arguendo that the CRMC's regulations constituted a taking of the plaintiff's property, the state would not be required to compensate the plaintiff if it demonstrated that the use prohibited by the CRMC regulation constituted a public or private nuisance. *Brunelle*, Slip Op. at 13. The United States Supreme Court noted that its "total taking" inquiry under *Lucas* would include an analysis of "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question . . ." *Lucas*, 112 S. Ct. 2886, 2901, 505 U.S. 1003, 1030-31. At trial, the CRMC introduced evidence regarding the off-site impacts of the plaintiff's proposal. *Cf.*, *Ocean Road Partners v. State*, 670 A.2d 246 (1996) (Rejecting argument that just compensation must include entrepreneurial profit where plaintiff had not made improvements to property at the time of taking). The CRMC introduced evidence that the filling of 18 acres of salt marsh would reduce the existing salt marsh in Winnapaug Pond by 12 percent. In addition, the evidence showed that a 12 percent reduction in the salt marsh in Winnapaug Pond would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island. Moreover, the evidence indicated that the 12 percent loss of the total salt marsh filtering in the Winnapaug Pond will have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected

to result in increased harmful nitrate levels within the pond. The evidence illustrated that high levels of nitrate in groundwater poses a public health threat because groundwater is the sole source of drinking water. Therefore, based on evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater, and based on the evidence that the plaintiff's proposal would not be suitable for the locality of the subject property, this Court finds that the plaintiff's proposal would constitute a public nuisance. As a result, even were this Court to determine that CRMC's denial of the plaintiff's application was a "total taking" under *Lucas*, the nuisance doctrine would prevent this Court from awarding the plaintiff compensation.

Furthermore, the plaintiff's claim must fail because he did not have any investment-backed expectations. In a factually similar case, the Rhode Island Supreme Court denied a landowner's claim for inverse condemnation against the Department of Environmental Management (DEM). In *Allegria v. Keeney*, the Rhode Island Supreme Court denied the plaintiff's claim that DEM's denial of his application to develop property which contained wetlands constituted a taking. 687 A.2d 1250 (1997). In denying the plaintiff's claim the Court reasoned that the plaintiff's knowledge of the applicable regulations was relevant to its inquiry into the plaintiff's investment-backed expectations. 687 A.2d at 1253. The court specifically noted that the plaintiff had not been prohibited from pursuing alternative proposals. "Any investment-backed expectation to develop the property as though wetlands were not present, however, was unreasonable in light of this state's pervasive wetlands regulations." *Id.* at 1254. Similarly, the plaintiff in the instant matter took title to the property in 1978 subject to the wetlands regulations so, like the plaintiff in *Allegria*, he cannot claim that he had an investment-backed expectations. Moreover, the plaintiff has not been prevented nor would he be prevented from developing the property along the eastern end of Shore Gardens

Road. Consequently, this Court finds that the plaintiff has not demonstrated a taking under *Penn Central* with respect to investment-backed expectations because he knew that the state regulated the filling of wetlands since 1965 and because is able to pursue a smaller and more appropriate proposal to develop the subject property.

Alternatively, even if the plaintiff were title holder of the majority of the property since 1961, the plaintiff still failed to prove a takings claim. This court has held "that pecuniary loss or diminution in value is not controlling on the issue of confiscation because a property owner does not have a vested property right in maximizing the value of his property." 687 A.2d 1249, 1253 (quoting *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 140). The plaintiff paid approximately $8,000 for the property acquired in 1959 and SGI paid approximately $5,000 for the property acquired in 1969. The evidence showed that SGI sold six individually buildable parcels of the property between 1959 and 1961. If this Court determined that the plaintiff owned the subject property, in 1961, then it must also determine that the plaintiff, as opposed to SGI, benefitted from the parcels sold in 1961. The plaintiff cannot claim that he owned the property for one purpose and that SGI owned the property for another purpose. As a result, even if the plaintiff did not recover his initial total investment of $13,000, he did receive some economic benefit when the parcels were sold, so that his initial investment cannot be characterized as non-economic for purposes of a takings analysis. *See Allegria*, 687 A.2d 1249, 1253. The plaintiff has not lost all or even a substantial use of the subject property.

Finally, the plaintiff's reliance on *L.A. Ray Realty, et al. v. Town Council of the Town of Cumberland, et al.*, is misplaced. 698 A.2d 202 (1997). In *L.A. Ray*, the Court found that government officials' denial of a development project violated that plaintiff's substantive and procedural due process rights. The evidence at trail showed that the two proposals submitted to the

CRMC were nearly identical to the proposals submitted to the DHR in 1962, 1963, and 1966 and rejected in 1971. The plaintiff's plans to dredge Winnapaug Pond and fill the wetlands on his property in order to develop either a large-scale subdivision or a recreational beach were both denied by DHR. The plaintiff never appealed that decision. In 1983, approximately 12 years after DHR denied the plaintiff's proposals based on regulations in place prior to 1971, the plaintiff took a second "bite at the apple" when he submitted the applications to the CRMC, the agency which succeeded DHR in regulating wetlands. The record reflects that the plaintiff has been afforded ample procedural due process.

CONCLUSION

Accordingly, this Court denies the plaintiff's request for relief and enters judgment for the defendant State of Rhode Island. Counsel shall confer and agree upon an appropriate form of order and judgment reflective of this Court's decision and submit it to the Court forthwith for entry.

(2)

No. 99-2047

Supreme Court, U.S.
FILED
AUG 17 2000
CLERK

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Rhode Island

MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIAN A. GOLDMAN, ESQ.
GOLDMAN & BIAFORE
101 Dyer Street, No. 301
Providence, RI 02903

MICHAEL RUBIN,
Assistant Attorney General & Environmental Advocate
Counsel of Record
Chief, Environmental Unit
Rhode Island Attorney General's Office
150 South Main Street
Providence, RI 02903
(401) 274-4400 Ex. 2297

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

25pp

QUESTIONS PRESENTED

1. Can a regulatory takings claim arising from a State's rejection of an application to fill wetlands be barred due to insufficient investment-backed expectations on the part of the claimant under the following peculiar circumstances: (1) the State had, previous to the claimant's acquisition of the land, rejected an identical application submitted by the claimant's predecessor and (2) the claimant himself had personally handled the earlier rejected application on behalf of the predecessor?

2. Is an inverse condemnation claim ripe where the trial court finds that (1) there was an abject failure to apply for the subdivision which forms the basis which Petitioner now claims was denied and (2) although a land-use agency has authoritatively denied the most physically intensive possible use of certain land, there are reasonably viable, less ambitious, alternative permitted uses which were not yet sought by the owner?

3. Does regulated property have economically viable uses where, when used in a permissible manner, it has a value of 200,000 dollars, a value even greater than the property would have had under the use originally intended by the applicant?

TABLE OF CONTENTS

Page

Table of Contents ii

Table of Authorities iv

Statement of the Case 1

Factual Background 1

Procedural History 4

I. Administrative Proceedings 5

II. Judicial Proceedings 8

Reasons Why the Petition Should Be Denied 10

1. The question regarding prior regulations is not well presented by these facts 10

i. The Petitioner implicitly asks the Court to make factual findings regarding the nature and extent of Petitioner's failed previous attempts to obtain regulatory approval on behalf of a predecessor .. 11

ii. The question purportedly raised is not in fact presented on this record 12

iii. The factual circumstances are quirky and unique 14

iv. The redundant nature of Petitioner's application suggests an alternative ground for affirmance, rendering the issue posed non-dispositive and advisory 14

2. The claim is not ripe because the Petitioner never applied for the project 16

TABLE OF CONTENTS - Continued

Page

3. The question regarding economically viable uses of regulated property is not presented by these facts 19

4. There are multiple other grounds to sustain the lower court decision 19

Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

Baytree of Inverrary v. Lauderhill, 873 F.2d 1407 (11th Cir. 1989) 19

Brecciaroli v. Connecticut, 362 A.2d 948 (Conn. 1975) 19

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991) 17

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) 17

Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Hawaii 1986) 17

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 20

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 106 S.Ct. 2561, 91 L.Ed.2d 285 (1986) 19

Narragansett Co. v. MacKenzie, 34 R.I. 103, 82 A. 804 (1912) 20

Palazzolo v. Coastal Resources Management Council, 746 A.2d 707 (R.I. 2000) 1

Palazzolo v. Coastal Res. Mgt. Council, 1995 WL 941370 (R.I.Super., Jan 05, 1995) (C.A. No. 86-1496) 8

Palazzolo v. Coastal Resources Management Council, 657 A.2d 1050 (1995) 9

Southern Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1992) 17

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985) 16, 17, 18

STATEMENT OF THE CASE

FACTUAL BACKGROUND

Included in the Petitioner's Appendix is the trial decision in the instant case: *Palazzolo v. Coastal Resources Management Council*, C.A. No.: 88-0297, slip op. denying relief after non-jury trial (Wash. Cty. R.I. Super. Ct. Oct. 24, 1997) (Williams, J.) *aff'd*. 746A.2d 707 (R.I. 2000). Having had the benefit of presiding over a nearly two-week trial, Mr. Justice Frank J. Williams of the Rhode Island Superior Court granted judgment to the Defendant-agency, holding that there was no Fifth Amendment taking of the marshlands and associated uplands at issue in this case. The trial judge found that CRMC's denial of a permit to conduct massive wholesale destruction of the entirety of the pristine coastal salt marsh located on the parcel did *not* amount to undue or unbearable interference with legitimate private investment-backed expectations.

To elaborate, Petitioner presented to the trial court a multi-million dollar claim based on a particular grandiose scheme (which scheme had never been adequately detailed before the agency in any event). The scheme presented at trial was a plan to shoe-horn 74 homes, each with its own septic tank system, into a marshland site of roughly 18 acres (of which Petitioner was not even record owner), adjacent to a sensitive coastal pond. The Trial Justice, however, held that the realization of this particular ambitious proposal was not a vested property right which is protected by the Fifth Amendment.

The site at issue in this case is mostly marshland. The area comprises roughly 18 acres of inter-tidal estuarine

coastal pond salt marsh (plus a few additional acres of upland). These 18 acres are located along the southern shoreline of Winnapaug Pond. Salt marshes, such as the site at issue, provide many important public safety and habitat functions.

A Corporation, by the name of Shore Gardens, Inc. ("SGI"), acquired the site in 1959; by that transaction, the site went into the hands of SGI, *not* Mr. Palazzolo individually. Indeed, the area conveyed in 1959, except for some individual lots later deeded out by SGI for development, still stands in the name Shore Gardens, Inc. Thus, Mr. Palazzolo's suggestion that he had acquired the land in late 1959, and to have held it ever since, is completely unfounded. (Petitioner commences the "Factual Background" section of his Petition by creating some confusion in this regard.)

Viewing SGI's parcel as a whole, it is clear that SGI put the land to beneficial use by private lot sales; SGI sold off six separate developable parcels shortly after acquisition. Thus, even if, contrary to the lower court's finding, the relevant acquisition date were to be 1959 (as suggested by Petitioner), these transactions would establish the existence of beneficial use of the land since the time of that acquisition. In other words, even under Mr. Palazzolo's interpretation of the facts, Mr. Palazzolo's holdings were not rendered worthless.

In 1965, the Rhode Island legislature enacted the R.I. Inter-tidal Wetlands Protection Act, declaring that salt marshes were to be protected and, in 1971, the legislature enacted the Coastal Resources Management Act, creating the Coastal Resources Management Council and giving

the CRMC the authority to regulate coastal wetlands. In 1976, CRMC adopted the Coastal Resources Management Plan ("CRMP") which prohibits the filling of coastal wetlands except under rare circumstances. (Under CRMC terminology, this is referred to as a "special exception" but, in this context, this term denotes a much more rigorous standard than under municipal zoning practice.)

On February 27, 1978, the Secretary of State revoked SGI's corporate charter. This fact indicates that the corporation existed at least until that date; therefore, any devolution of title by operation-of-law to Mr. Palazzolo, as belatedly asserted by him, could not have taken place prior to this time. In other words, the Petitioner did not acquire the land (if he ever acquired it at all) until after the statutory prohibitions on filling inter-tidal wetlands, such as the subject parcel, were enacted.

Beginning in the 1960s, Mr. Palazzolo (presumably on behalf of the corporation, although the applications were in his own name) filed a series of overlapping and redundant applications to fill the wetlands on the property. After certain failed applications in the 1960s (finally denied in 1971 and never appealed), Mr. Palazzolo again filed applications with the CRMC to fill the full 18 acres of marshland in 1983 and 1985.

There were three curious facts about his latest set of applications. First, as noted above, they are in Mr. Palazzolo's own name even though the land was then held by SGI. Second , they virtually duplicated the previously rejected applications. Third, the applications called for *filling* of the area, but did not call for *development* of the area as residences. In other words, Mr. Palazzolo hid any

intention to build the project that forms the basis of the instant claim. To put the matter another way, Petitioner disclaimed any intention to apply for the project which Petitioner now complains was thwarted by the CRMC.

The filling of 18 acres of salt marsh proposed by Mr. Palazzolo would not only have completely obliterated that particular section of the ecosystem, but would also have devastated the pond as a whole as well as the finfish and shellfish which depend on that waterbody.

In 1984 and 1986, the Council issued decisions rejecting the 1983 and 1985 applications, respectively. These decisions were affirmed in an APA appeal undertaken by Mr. Palazzolo. In other words, in prior litigation, the Rhode Island Superior Court (per Justice Israel) affirmed the CRMC decisions.

A portion of the site, a piece of upland, would have been approved by the CRMC as a single home site. Moreover, such use would have netted greater proceeds (*i.e.*, $200,000), at less risk, than the subdivision proposal on which Mr. Palazzolo bases the current Petition. This option is still available to Mr. Palazzolo (provided he secures clear title) but he has never pursued it.

PROCEDURAL HISTORY

The travel of this case and the underlying applications are seemingly fraught with complexity: there have been five state-level administrative proceedings and two lawsuits (including two visits to the Rhode Island Supreme Court). However, much confusion can be

avoided by keeping a simple premise in mind: Petitioner has a penchant for repetitive applications.

I. ADMINISTRATIVE PROCEEDINGS.

Mr. Palazzolo filed a series of five applications with state agencies (and one to the United States Army Corps of Engineers). However, these earlier applications do not represent five different concepts or designs. Rather, the applications are mostly duplicative. The five state-level applications (as well as the Federal application) are detailed here.

First, on March 29, 1962, Petitioner filed an application for authorization to dredge 60,000 cubic yards of material from the bottom of Winnapaug Pond and to use the dredge material to fill approximately 18 acres of salt marsh constituting the parcel at issue here. Said parcel stood then, and now, in the name of Shore Gardens, Inc. This application was filed with the State Department of Natural Resources ("DNR"), Division of Harbors and Rivers ("DHR")

On October 5, 1962, the application and plans were returned to the Petitioner because of inaccuracies and the absence of essential basic information.

Second, on May 16, 1963, Petitioner submitted a second application to DHR. This sought to dredge two channels and build a reinforced concrete bulkhead on the parcel. This second application is distinguished from the first application only with respect to the source of the fill material.

Third, on or about April 29, 1966, Petitioner filed a third application. The application proposed to construct a recreational beach facility. Additionally, Petitioner proposed to fill the salt marsh to create the facility.

On November 17, 1971, the Rhode Island Div. of Harbors & Rivers (revoking a prior letter) disapproved both the second application and the third application.

On December 1, 1971, the Army Corps of Engineers, concurring in the result of its State counterpart agency, denied an application the Petitioner had filed with that department. This Petitioner's application to the Corps had been identical to the May 16, 1963 application filed with DHR.

Petitioner took no administrative appeal from these denials nor did he file a takings claim against the R.I. Department of Harbors and Rivers or the Army Corps of Engineers.

At this juncture, it should be noted that the Rhode Island Coastal Resources Management Council ("CRMC" or "the Council") is a successor to the Department of Harbors and Rivers for the purposes of in-water activities and salt marsh filling.

Fourth, on or about March of 1983, Petitioner filed an application with the CRMC to construct a wooden bulkhead on the shoreline of Winnapaug Pond and to fill approximately 18 acres of salt marsh.

Two crucial observations must be made.

The initial observation is that the application filed by Petitioner in 1983 was nearly identical to the May 16, 1963

application filed by Petitioner with the Division of Harbors & Rivers and which was denied by that agency in 1971.

The next observation is that, in this 1983 application to the CRMC, there was no indication (either in the application materials themselves or through the direct testimony given by Petitioner before the CRMC) that he had any intention of pursuing a residential subdivision.

The CRMC regulations, as well as the testimony of the Council's executive director, confirm the fact that Petitioner's application was a piecemeal application. There is a severe distinction between applying to merely fill, on one hand, and applying to fill *and* develop, on the other. If the Petitioner had advised the CRMC that he intended to pursue a subdivision, the Council would have deemed the application deficient because it lacked the prerequisite approvals by local, state, and federal agencies.

Specifically, the application lacked Rhode Island Department of Environmental Management Section 404 Water Quality Certification, ISDS approvals, zoning and building approvals, State Building Code Section 8 approval for flood plane construction, Army Corps of Engineers Section 10 Harbors & Rivers Act and Section 404 Clean Waters Act approvals, and Historic Preservation Commission approval.

This application was rejected by a full Council Decision dated July 12, 1984. Notably, the full Council found, *inter alia*, that the application was to "construct and maintain a pile bulkhead and place fill below MHW."

Fifth, on or about January of 1985, Petitioner filed a second application with the CRMC; this application was to construct a recreational beach facility and to fill the salt marsh in order to do so.

Again, a crucial observation must be made. Specifically, based upon the pertinent comparison, the application filed in 1985 was nearly identical to one of the earlier applications filed by Petitioner; *i.e.*, the April 29, 1966, application filed by Petitioner with the Division of Harbors & Rivers which was also denied in 1971.

This application too was rejected. This was accomplished by a decision which was apparently issued on February 18, 1986. Among other findings, this decision found that "the tidal marsh is subject to tidal inundation daily."

II. JUDICIAL PROCEEDINGS.

There followed two lawsuits.

First, the Petitioner appealed under G.L. 42-35-15, The Rhode Island Administrative Procedures Act, from the 1986 decision in which the CRMC denied the Petitioner's application to fill the wetland adjacent to Winnapaug Pond. The Petitioner's complaint was filed on April 3, 1986.

At one point, Mr. Palazzolo attempted to withdraw his appeal from the decision of the CRMC but then changed his mind, resulting in a decision of the Rhode Island Superior Court upholding the agency. *Palazzolo v. Coastal Res. Mgt. Council*, 1995 WL 941370 (R.I.Super., Jan 05, 1995) (C.A. No. 86-1496) (Israel, J.).

Second, Mr. Palazzolo brought this instant action in Washington County Superior Court, in which Mr. Palazzolo sought to have damages assessed for the supposed inverse condemnation of this land. In this action, filed in June 1988, Mr. Palazzolo sued the CRMC, alleging that its denial of the application (which was then also the subject of the administrative appeal before Justice Israel) constituted part of the deprivation of all beneficial use of his property. Mr. Palazzolo asserted that he was entitled to compensation in the principal amount of 3.15 million dollars based on the inability to realize a 74-lot subdivision in which each lot would support an individual residence. Petitioner was quite emphatic in basing his theory of recovery on the prospect of 74 separate homes-sites.

On January 24, 1994, in the instant case, the Superior Court granted a motion to dismiss under Rhode Island Superior Court Rule of Civil Procedure Rule 41(b) for lack of diligent prosecution and failure to comply with the Rules of Civil Procedure. Mr. Palazzolo then appealed that dismissal to the Rhode Island Supreme Court resulting in a decision remanding the case for trial. *Palazzolo v. Coastal Resources Management Council*, 657 A.2d 1050 (1995).

A trial ensued in 1997, resulting in the decision of the trial judge (ruling on a multiplicity of independent alternative grounds); this, in turn, resulted in a second decision from the Rhode Island Supreme Court (explicitly affirming some of the grounds of the trial court and leaving the others undisturbed) now challenged on this Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The question regarding prior regulations is not well presented by these facts.

The Petioner's first issue (relating to regulations which pre-date acquisitions) is a "fact-bound" question in four senses of the phrase. First, this supposedly *cert*-worthy issue is actually mired in factual disputes unworthy of Supreme Court review. Second, once the facts established below are properly understood, it is clear that the broad issue abstracted by Petitioner is not actually presented. Third, the case is odd and unusual; any ruling would have limited real-world precedential importance. Lastly, the facts suggest an alternative ground of affirmance; this renders the purported issue advisory in this context.

In approaching this subject, it is important to quickly recapitulate certain background. The court will recall the duplicative nature of Mr. Palazzolo's submissions. *See* Appx. A-5 (detailing the "nearly identical" prior applications). The 1960s set of applications (rejected in 1971 under previous regulations) and the 1980s set of applications (rejected in the mid-80s under the current regulations and giving rise to this suit) were identical.

The fact that the underlying applications were really repeat filings of plans rejected in 1971 makes this case unique.

In other words, having seen that his future property had been regulated in a certain manner in 1971, Petitioner necessarily had limited expectations thereafter. He must have expected that the land would be regulated in a

similar, or more restrictive, manner in 1978 when he acquired the land. The same applies to 1983, the date of his redundant application. Thus, Mr. Palazzolo necessarily lacked an individual expectation of massive developability because of his own familiarity with identical prior applications which were denied under the previous regulatory regime.

In this light, the four aspects of the fact-bound nature of the Petition are detailed here.

i. The Petitioner implicitly asks the Court to make factual findings regarding the nature and extent of Petitioner's failed previous attempts to obtain regulatory approval on behalf of a predecessor.

First, because of the special facts cited above, the issue raised cannot be reached without becoming bogged down in complicated questions of fact regarding the precise timing, extent and significance of Mr. Palazzolo's involvement in the previously rejected applications. There are intricate facts to be sorted out. Just one example of such a complexity is the question of the precise extent to which Mr. Palazzolo's prior experience should have forewarned him of the government's actions a decade or so later. Relatedly, the precise comparability of the various regulatory schemes in effect over several decades remains to be determined. In short, the Court would be forced to review not only the events of the 1980s but the events of the 1960s as well.

Thus, the issue as to Mr. Palazzolo's expectations as of 1978 is intensely fact-specific. (Petitioner does not, and cannot, argue against the judgment of the state supreme

court establishing the acquisition date as 1978; decisions as to the rights of sole shareholders with respect to corporate assets during and after the period of corporate existence rest on purely the state-law grounds.) A determination was made by two lower courts that Mr. Palazzolo lacked sufficient expectations at the time of his acquisition. These findings must be reviewed, if they are to be reviewed at all, in light of Mr. Palazzolo's prior familiarity with the State's rejection of previous identical applications made almost thirty-five years ago.

Petitioner, of course, knows better than to directly attack settled findings of fact. Rather, Petitioner glosses over inconvenient truths. Specifically, Petitioner would have this Court turn a blind eye to Mr. Palazzolo's personal knowledge, years before his own acquisition, of the limited developability of the parcel – knowledge gleaned from his own involvement in failed attempts to obtain regulatory approval for an identical project in the 1960s. However, this Court would not itself turn a blind eye to these circumstances or to the undersigned Respondent's factual contentions. Thus, this Court would inevitably become enmeshed in the complications of a voluminous record.

ii. The question purportedly raised is not in fact presented on this record.

Second, Petitioner misleadingly postulates the question. The lead issue in this case is set out in the Petition as:

> Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

(Emphasis in original)

While the Petitioner posits a neat academic question, the question does not take into account the peculiar situation at hand. In other words, the instant record is inappropriate for resolution of the issue stated by Petitioner. The facts are complex, as we have seen, in that Mr. Palazzolo, presumably acting on behalf of a corporate owner, had previously been rejected with respect to the exact same scheme. This previous rejection was accomplished at a point in time that was both prior to the acquisition of the land *and* prior to the enactment of the regulation at hand. Such rejection had been accomplished years beforehand under an older, more lenient, statutory scheme.

To take into account the peculiarities of the instant case the question would, at a minimum, have to be restated thus:

> Whether a regulatory takings claim for a particular rejected project is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property and the claimant, prior to acquisition, had previously been rejected for the exact same plan on the exact same land under an earlier, more lenient, regulatory scheme.

Thus, the earlier applications, culminating in a 1971 rejection, make this a poor test case of the issue hypothesized in the Petition. Another case might well present this issue, but these facts do not.

iii. The factual circumstances are quirky and unique.

Further, the issue in the present case is unlikely to recur and is too narrow to warrant review by this Court on *certiorari*. The only real question Mr. Palazzolo raises in his Petition turns on the particular facts of this case alone and are of interest only to the parties to it. It can arise only in those few cases which unfold according to the following scenario: a permit is unsuccessfully sought by a person who also handled an unsuccessful application for the exact same project on the exact same land under a more generous regulatory regime a decade or more before the application at issue and prior to the onset of his ownership.

Properly understood, the case does not in any sense broadly concern the expectations test of the Takings Clause. It involves only the application of that test to idiosyncratic facts.

iv. The redundant nature of Petitioner's application suggests an alternative ground for affirmance, rendering the issue posed non-dispositive and advisory.

Assuming *arguendo* that this Court were inclined to overlook these complexities in making its *certiorari* determination, the factual nuance of repeat applications presents yet another problem.

Even if this court were to delve into the abstract proposition solicited by the Petitioner, the Court would make little progress in resolving the case at hand. This is

because the repeat application aspect of this case gives rise to an alternative ground of decision in favor of the Respondent. In sum, the Court's efforts would be advisory.

One reaches this conclusion by exploring the logical implications of the Petitioner's redundant applications. The duplicative nature of Mr. Palazzolo's submissions suggests the legal conclusion that any conceivable taking took place in 1971, not 1983.

Again we start with the acknowledged fact that the 1960s set of applications (rejected in 1971) and the 1980s set of applications (rejected in the mid-80s and giving rise to this suit) were identical.

A necessary conclusion follows. The fact that the underlying applications were really repeat filings of plans rejected in 1971 bars this case. If the CRMC's action constituted a taking, then the DNR's action did too. If so, Petitioner could have brought suit over the 1971 decision. Once having a claim, a Petitioner must act in a timely manner.

After the claim is time-barred, a Petitioner cannot stage a reenactment of the incident in order to revive his claim. This is especially true in the takings context. A particular property interest can be taken only once. Once confiscated, a property interest is not available to be confiscated anew.

In other words, if there were a taking, it was in 1971 and this suit is well outside of any possible limitations period.

2. The claim is not ripe because the Petitioner never applied for the project.

Here again, this case is uniquely fact-bound. Petitioner avoids certain essentials – the forgotten fact is that Petitioner never applied to develop the property in the manner which forms the basis of his claim.

The Petition relies on the finality branch of the ripeness doctrine. Within that branch, the Petition focuses on the definitive decision requirement. But there is another aspect to the ripeness doctrine which the Petitioner ignores: The meaningful application requirement. Any grant of *certiorari* to review the lower court's application of the ripeness test would be a futile gesture in light of the abject failure to meet the meaningful application requirement.

The ripeness requirement has special force in the takings context. The leading case is, of course, *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), ruling that a "final, definitive position regarding how [the governmental entity] will apply the regulations at issue to the particular land in question" is required. *Id.* at 191, 105 S.Ct. at 3119. *Williamson County* requires that an applicant must obtain a conclusive determination whether a specific proposed development will be permitted in order to bring a takings claim. *Id.* at 193, 105 S.Ct. at 3120. The *Williamson County* Court also indicated that the "final decision" element requires a "plan for developing [the] property." *Id.* at 187, 105 S.Ct. at 3117. Thus,

Williamson County has given rise to a "meaningful application" threshold. Lower federal courts have, therefore, found claims *un*ripe where a developer, even after making demonstrable efforts, failed to make its development intentions clear. Reflecting this standard, the First Circuit ruled that "[t]o be 'meaningful,' an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current." *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991), *cert. denied*, 502 U.S. 866, 112 S.Ct. 192, 116 L.Ed.2d 153 (1991).

Courts have said that, even if a property owner does make significant efforts, these efforts must be directed specifically to the intended development of the property. A property owner must be seeking to develop the land, rather than simply asserting a legal position. For example, mere opposition to a down-zoning, coupled with suggestions to continue pre-existing zoning, will not suffice; a property owner must give "indication . . . of how [it] might intend to develop the property if permitted to do so." *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990), *cert. denied*, 502 U.S. 943, 112 S.Ct. 382, 116 L.Ed.2d 333 (1992); *see also Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 941-42 (D. Hawaii 1986) ("Petitioners have been involved in an ongoing attempt to develop . . . a resort. The majority of their activity, however, has been attempts to influence the drafting of the . . . Plan and amendments. . . . Petitioners have made no attempt to apply for development permits, zoning changes or variances . . . under [the] present zoning"); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 n.37, 101 S.Ct. 2352, 2371 n.37, 69 L.Ed.2d 1 (1981) (a taking claim by an association of coal

miners was not ripe because they "made no showing . . . that they own tracts of land that [are] affected by the provision.").

In sum, a meaningful application must be formally filed, must be essentially complete, and most importantly, must reveal the project which ultimately forms the basis of the takings claim.

Turning to the matter at bar, it is incomprehensible that Petitioner can claim that development opportunities were taken from him when such opportunities never formed the basis of an application. It would be a perversion of sensible process for the Petitioner to be allowed, in essence, to initially apply to a Court to vindicate an alleged right to build; this would be incongruous in light of the fact that he never sought such permission from any agency. Indeed, if Petitioner had sought to realize his development rights he would have first applied to the Rhode Island Department of Environmental Management for an ISDS (individual sewage disposal system, *i.e.*, septic tank) permit rather than to the CRMC for a fill permit. It is a further perversion of sensible process for Petitioner to direct his litigative wrath at the wrong agency – the CRMC, which is not in a position to approve or deny the ISDS (septic tank) permits which would be the legal cornerstone of any allowable development. Moreover, if Petitioner had followed the course of action called for by the *Williamson* doctrine, the judiciary would now be left in the dark as to the prospect of wholesale septic failure.

The claim is not ripe on this basis alone, even if it were ripe from a definitive decision standpoint. Therefore, *certiorari* would be a futile gesture at best.

3. The question regarding economically viable uses of regulated property is not presented by these facts.

The denial of a particular application usually does not constitute a taking when there are other economically viable alternatives still permissible. Petitioner cannot escape the effects of this rule by claiming that an application for any particular project would have been futile. It is sufficient if the CRMC would have probably been favorable to other, more modest proposals from this developer. *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, at 353, n.9, 106 S.Ct. 2561, at 2568, n.9, 91 L.Ed.2d 285 (1986) ("[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews.") *Baytree of Inverrary v. Lauderhill*, 873 F.2d 1407 (11th Cir. 1989) (owner must explore more modest proposals where agency will not let him develop land as originally intended); *Brecciaroli v. Connecticut*, 362 A.2d 948 (Conn. 1975) (denial of application to fill portion of wetland not a taking where owner could make subsequent application to fill smaller area). Specifically, the Council would be happy to have Petitioner situate a single home thus allowing Petitioner to realize $200,000.

4. There are multiple other grounds to sustain the lower court decision.

There are a multiplicity of other grounds for affirmance; these alternative bases of decision suggest that *certiorari* would be an academic exercise.

- Assuming, *arguendo*, that Petitioner's acquisition date is deemed to be the date on which SGI acquired the

site, Petitioner still lacks sufficient expectations with respect to five crucial lots which were not acquired until 1969, after the inter-tidal wetlands Act came into effect.

- It is never a taking to forbid uses which, because they are barred by "background principles of the State's law . . . nuisance," are not originally part of the owner's title rights. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).
- The public trust doctrine and the corresponding law of riparian rights, establishes that the State owns submerged and intertidal lands (such as the land at issue here). *E.g., Narragansett Co. v. MacKenzie*, 34 R.I. 103, 112, 82 A. 804, 809 (1912) ("fee of the land below high-water mark is in the state").

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

Appellee
By its Attorney,
SHELDON WHITEHOUSE
Attorney General

MICHAEL RUBIN, ESQ., Bar # 3656
Assistant Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400, Ext. 2297
Fax: (401) 273-4270

BRIAN A. GOLDMAN, ESQ.
GOLDMAN & BIAFORE
101 Dyer Street, No. 301
Providence, RI 02903

Supreme Court, U.S.
FILED
AUG 2 3 2000
CLERK

(3)

No. 99-2047

In the
Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Rhode Island

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

1204

QUESTIONS PRESENTED

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 1

I. THE POST-ENACTMENT PURCHASER QUESTION 1

II. THE RIPENESS QUESTION 5

III. ECONOMICALLY VIABLE USE QUESTION 6

IV. MISCELLANEOUS 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

Cases

California v. Ramos, 463 U.S. 992 (1983) 4

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) 6

Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988) 6-7

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 4

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 1-2

United Air Lines v. Mahin, 410 U.S. 623 (1973) 4

United States v. Johnston, 268 U.S. 220 (1925) 1

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 4

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Palazzolo respectfully files this reply to the Opposition to Petition for Writ of Certiorari (Opp.).

INTRODUCTION

Ignoring the longstanding principle that this Court "do[es] not grant a [petition for] certiorari to review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), Respondents' opposition to the petition consists in large part of a review of the evidence and a discussion of specific facts. *See* Opp. at 1-9. As explained below, this review and this discussion are utterly irrelevant to the Court's consideration of the questions presented.

ARGUMENT

I

THE POST-ENACTMENT PURCHASER QUESTION

The first question presented by Mr. Palazzolo is whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property. The court below answered this question in the affirmative, ruling that a *Lucas*-type "regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." Appendix to Petition for Writ of Certiorari (Pet. App.) at A–14. The court below further ruled that a *Penn Central*-type regulatory takings claim must necessarily fail in this situation as well, because a property owner can have no "reasonable investment-backed expectations" of developing property if, at the time he acquired it, "there were already regulations in place limiting [his] ability to" develop. *Id.* at A–17.

The petition demonstrated how these rulings are fundamentally incompatible with this Court's decision in *Nollan v.*

California Coastal Commission, 483 U.S. 825 (1987); with the decisions of the Ninth Circuit; and with decisions of the New Jersey, Florida, and Colorado courts. *See* Petition for Writ of Certiorari (Pet.) at 7-10. The petition also explained why it is appropriate to resolve the issue in this case. *See id.* at 10-13.

What do Respondents offer in response to these points? Do they offer a competing interpretation of *Nollan*? Do they dispute the existence of a conflict in the lower courts? No, Respondents can only assert that "[t]he question regarding prior regulations is not well presented by these facts," because it is "a 'fact-bound' question." Opp. at 10. This assertion is totally and completely false.

First, it is simply untrue that the first question presented "cannot be reached without becoming bogged down in complicated questions of fact regarding the precise timing, extent and significance of Mr. Palazzolo's involvement in the previously rejected applications." Opp. at 11. There are no complicated questions of fact in this case. Although Mr. Palazzolo litigated the facts below, he readily concedes for purposes of review in this Court that he became the "owner" of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property. Nor would he "have this Court turn a blind eye" to his "personal knowledge . . . of the limited developability of the parcel." Opp. at 12. Again, Mr. Palazzolo is happy to concede that he was, like the prevailing property owners in *Nollan*, "on notice" of the confiscatory regulations. 483 U.S. at 860 (Brennan, J., dissenting).

But resolution of the question presented does not turn on the *existence* of these facts but rather on their *legal relevance*. The Rhode Island Supreme Court below treated these facts as dispositive, ruling that they altered—nay, abolished—his rights under the Takings Clause. By contrast, Mr. Palazzolo argues, like the prevailing property owners in *Nollan* argued, that his "rights [are *not*] altered because [he] acquired the land *well*

after the [government] had begun to implement its policy." *Id.* at 834 n.2 (emphasis added).[1] To decide between these competing positions is to decide a *pure question of law*. So deciding would hardly cause this Court to "become enmeshed in the complications of a voluminous record." Opp. at 12.

Second, the question presented *is* raised on this record. Respondents' assertion to the contrary, *see* Opp. at 12-13, is grounded in the misconception that the judgment below turned on various "peculiarities" in the present case, Opp. at 13. But the court whose judgment is sought to be reviewed simply did not care about any of the so-called peculiarities mentioned by Respondents. It was solely the fact that Mr. Palazzolo "became the owner of the property *after* the regulation became effective," Pet. App. at A–15, that led the lower court to rule that his regulatory takings claims were categorically barred. *That* fact —a post-enactment purchase—is obviously not peculiar to the present case. *See, e.g.*, Pet. at 6, 9-10 (citing cases where the owner purchased property after enactment of the regulation).

Third, the facts of this case are not "quirky and unique." Opp. at 14. Those adjectives, along with "idiosyncratic," *id.*, are just synonyms for "peculiar."

Fourth, the supposed "alternative ground for affirmance" suggested by Respondents would *not* make a ruling on the first question presented "non-dispositive and advisory." Opp. at 14. Crucially, this "alternative ground"—that Mr. Palazzolo's takings claims are "time-barred," or "well outside of any possible limitations period," Opp. at 15—is a *state-law issue that was*

---

[1] This is the very same argument that Mr. Palazzolo advanced in the lower courts. *See, e.g.*, Pet. App. at A–15 ("Palazzolo argued that if in fact he became deprived of all beneficial use of the land, then under *Lucas* it is irrelevant *when* he became owner of the property. Under his reasoning, if a regulation deprives an owner of all beneficial use, it is immaterial whether the regulation predates the claimant's ownership of the land.").

not addressed by the courts below. But it is elementary that where, as here, a state-court judgment rests squarely on federal grounds, the fact that the state court "might have, but did not, invoke state law does not foreclose jurisdiction" in this Court. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977). In other words, the mere "possibility that the state court might have reached the same [result] if it had decided the [case] purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." *United Air Lines v. Mahin*, 410 U.S. 623, 630-31 (1973).

Nor does the possibility that a state court might, after reversal and remand from the Court, reach the same result but on different (state-law) grounds render this Court's ruling "non-dispositive and advisory." The possibility of such an outcome exists in many cases, and the Court has explicitly recognized the possibility without being troubled by it. *See, e.g., California v. Ramos*, 463 U.S. 992, 997 n.7 (1983) (overturning the state supreme court's reversal of a death sentence on federal constitutional grounds but noting that "[o]f course, on remand from this Court, the state court is free to determine whether as a matter of state law this evidentiary error is a sufficient basis for reversing the death sentence").[2] Indeed, when this Court reversed the South Carolina Supreme Court's ruling in favor of the government in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1031 (1992), the Court explicitly contemplated that the government could still "win its case" on nuisance-law grounds. But that issue was "one of state law to be dealt with on remand." *Id.* Although *Lucas* provoked vigorous dissents on the merits, not one Justice was concerned that the Court's opinion might, in these circumstances, be thought "advisory."

---

[2] On remand, the California Supreme Court did in fact reinstate its original judgment, this time relying on state law, *People v. Ramos*, 689 P.2d 430 (1984), and this Court denied the government's second petition for certiorari, *California v. Ramos*, 471 U.S. 1119 (1985).

In sum, none of the four reasons offered by Respondents is a legitimate basis for not considering the first question presented. It is unrefuted that such question is an important and recurring question of takings law on which the lower courts are in conflict with each other and with this Court.

II

THE RIPENESS QUESTION

Respondents assert that this case is not ripe because Mr. Palazzolo "never applied to develop the property in the manner which forms the basis of his claim." Opp. at 16. That assertion is false: ignoring the plain words of the opinions below, Respondents mischaracterize Mr. Palazzolo's takings claims.

Mr. Palazzolo has for many years desired to develop his property as either a single-family subdivision or a recreational beach facility. As Respondents repeatedly point out, however, all but a small portion of the property consists of "marshland," or (after verbal inflation) "inter-tidal estuarine coastal pond salt marsh." Opp. at 1-2. In other words, the property is presently a swamp, completely unsuitable for building permanent structures like homes or a beach club. Accordingly, Mr. Palazzolo repeatedly attempted to satisfy the most obvious prerequisite to developing his property by applying to Respondent Coastal Resources Management Council (or its predecessors) for a permit to fill the swamp. Those applications were denied and, as Mr. Palazzolo testified without contradiction, CRMC staff "informed him that ***any*** proposal involving the filling of wetlands would be denied." Pet. App. at B–5 (emphasis added).

It is precisely these denials that form the "basis," Opp. at 16, for Mr. Palazzolo's takings claims, as both the state courts recognized. The very first sentence of the trial court's opinion records that Mr. Palazzolo "claim[ed] that [CRMC's] *denial of his application to fill approximately 18 acres of wetlands . . .* constitutes an inverse condemnation taking." Pet. App. at B–1 (emphasis added). Likewise, in the very first sentence of its

opinion, the state supreme court recorded the same observation: Mr. Palazzolo "alleg[ed] that the CRMC's *denial of his application to fill eighteen acres of coastal wetlands* constituted a taking." Pet. App. at A–2 (emphasis added). The petition explained carefully why that denial was a "final decision" under this Court's ripeness jurisprudence. *See* Pet. at 15, 18-19 n.5. Respondents offer nothing to discredit that explanation.[3]

III

ECONOMICALLY VIABLE USE QUESTION

The third and final question presented by Mr. Palazzolo is whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero. The state supreme court answered this question in the affirmative, concluding that Mr. Palazzolo had not demonstrated a denial of all economically viable use based solely on evidence that "had he developed the upland portion of the land, its value would have been $200,000" and that "the wetlands would have value in the amount of $157,500 as an open-space gift." Pet. App. at A–12 to –13. The petition explained how this approach was contrary to the approach taken by the Ninth Circuit in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422, 1432-34 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999). Pointing out how lower courts have recognized that "the precise meaning of 'economically viable use of land' is elusive and has not been clarified by [this] Court," *Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841

---

[3] In this context, Respondents suggest that Mr. Palazzolo ought *first* to have applied to the state Department of Environmental Management for a septic tank permit before applying to Respondent CRMC for a fill permit. *See* Opp. at 18. Not only is this suggestion completely unsupported by any legal authority whatsoever, it is ludicrous on its face. One can imagine the Department's response to such an application: "You want to put septic tanks where? In the middle of a swamp? Perhaps you should first apply for a fill permit."

F.2d 872, 877 (9th Cir.), *cert. denied*, 488 U.S. 827 (1988), the petition urged that the Court grant certiorari to bring a much needed clarification to this important area of takings law.

Respondents challenge none of these points. They do not deny that the Supreme Court of Rhode Island "considered one piece of evidence—and one piece of evidence only" in ruling that Mr. Palazzolo had not suffered a denial of economically viable use. Pet. at 21. They do not deny that the Rhode Island court's approach to this issue simply cannot be reconciled with the Ninth Circuit's approach. They do not deny that the lower courts have recognized the need for clarification of the issue from this Court. Instead, Respondents merely parrot the lower court, gratuitously reiterating that Mr. Palazzolo could situate *one* home on eighteen-plus acres of property, giving that land a nonzero value. *See* Opp. at 20. This response does nothing to blunt the force of Mr. Palazzolo's arguments.[4]

IV

MISCELLANEOUS

Respondents close their Opposition by proffering three "alternative bases of decision" that would assertedly justify a denial of certiorari. Opp. at 19. The first is that Mr. Palazzolo "lacks sufficient expectations with respect to five crucial lots

---

[4] Respondents assert, without any citation to the record, that building a single home would allow Mr. Palazzolo to "realize $200,000." Opp. at 19. This assertion insinuates that Mr. Palazzolo could easily have earned a $200,000 *profit* on his decades-long investment in the subject property. But there is simply no evidence in the record to support this insinuation. Indeed, even the lower court's notion that the property could have a *value* of $200,000, *see* Pet. App. at A–12, completely failed to take into account such things as the economic feasibility of developing only a single house, whether Mr. Palazzolo would receive any return on his investment (including all the property taxes he had paid over the years), and whether the rate of that return would be constitutionally reasonable. *See* Pet. at 21.

[that] were not acquired until 1969, after the inter-tidal wetlands Act came into effect." Opp. at 20. But this supposedly "alternative" basis of decision—that the challenged land-use regulation predated Mr. Palazzolo's acquisition of the property—is *precisely the same* basis on which the Supreme Court of Rhode Island actually ruled. *See generally* Section I *supra*.

The two other grounds proffered by Respondents are that development of Mr. Palazzolo's property was forbidden by unspecified state nuisance law and that the State of Rhode Island actually owns the property under the state-law public trust doctrine. *See* Opp. at 20. But these were not "bases of decision" at all: the state supreme court did not even mention these state-law issues, let alone decide the case based on the issues. *See also supra* pp. 3-4 (showing why unaddressed state-law issues do not diminish the propriety or necessity of review).

CONCLUSION

For the foregoing reasons and for the reasons set forth in the petition, the petition for writ of certiorari should be granted.

DATED: August, 2000.

Respectfully submitted,

ERIC GRANT
Counsel of Record
JAMES S. BURLING
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

(5)

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

No. 99-2047

In the

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

JOINT APPENDIX

JAMES S. BURLING
Counsel of Record
ERIC GRANT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

SHELDON WHITEHOUSE
Attorney General
MICHAEL RUBIN
Counsel of Record
Assistant Attorney General
& Environment Advocate
150 South Main Street
Providence, Rhode Island 02903
Telephone: (401) 274-4400 x2297
Facsimile: (401) 273-4270

Counsel for Respondents

PETITION FOR CERTIORARI FILED JUNE 21, 2000
CERTIORARI GRANTED OCTOBER 10, 2000

108 pp

BRIAN A. GOLDMAN
GOLDMAN & BIAFORE
101 Dyer Street, No. 301
Providence, Rhode Island 02903
Telephone: (401) 274-1300
Facsimile: (401) 274-1343

RICHARD J. LAZARUS
Georgetown University
Law Center
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 662-9129
Facsimile: (202) 662-9408

Additional Counsel for Respondents

TABLE OF CONTENTS

Chronological List of Relevant Docket Entries 1

Plaintiff's Exhibit 4—Biologist's Field Report (Aug. 2, 1983) 3

Plaintiff's Exhibit 5—Engineer's Field Report (Aug. 10, 1983) 6

Defendants' Exhibit G—Transcript of Proceedings Before the Coastal Resources Management Council (Aug. 18, 1983) 10

Plaintiff's Exhibit 6—Decision of the Rhode Island Coastal Resources Management Council (July 12, 1984) 13

Plaintiff's Exhibit 10—Biologist's Field Report (July 16, 1985) 20

Plaintiff's Exhibit 9—Engineer's Field Report (July 25, 1985) 22

Plaintiff's Exhibit 11—Decision of the Rhode Island Coastal Resources Management Council (Mar. 3, 1986) 24

Defendants' Exhibit III—Decision of the Rhode Island Superior Court, Providence County, in C.A. No. 86-1496 (Israel, J.) (Jan. 5, 1995) 31

Amended Complaint (Oct. 23, 1995) 43

Plaintiff's Answers to Defendant State of Rhode Island's Interrogatories to Plaintiff (Sept. 3, 1996) 47

Plaintiff's Supplemental Answers to Defendant State of Rhode Island's Interrogatories (June 14, 1997) 48

Defendants' Exhibit W—Deposition of
Russell J. Chateauneuf (June 20, 1997) 49

Transcript of Proceedings (June 18-26, 1997) 58
Opening Statement of John B. Webster 58
Testimony of Anthony Palazzolo 58
Testimony of Grover John Fugate 60
Testimony of David F. Twombly 75
Testimony of David S. Reis 80
Testimony of Alfred G. Thibodeau 95
Testimony of Thomas S. Andolfo 101

Decision of the Rhode Island Superior Court
(Williams, J.) (Oct. 24, 1997) ..... Pet. App. B–1

Opinion of the Rhode Island Supreme Court
(Feb. 25, 2000) ..... Pet. App. A–1

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, SC		SUPERIOR COURT
ANTHONY PALAZZOLO, individually and as successor in the title to SHORE GARDENS, INC.,	:	
v.	:	C.A. No. 88-0297
COASTAL RESOURCES MANAGEMENT COUNCIL, ET AL.	:	

June 15, 1988	Complaint filed in Superior Court of Rhode Island, Providence County
January 24, 1994	Complaint dismissed with prejudice pursuant to Superior Court Rule of Civil Procedure 41(b)(2)
February 22, 1994	Motion to vacate dismissal denied
March 14, 1994	Notice of appeal filed
May 1, 1995	Opinion of Supreme Court of Rhode Island reversing denial of motion to vacate and remanding case for further proceedings
October 23, 1995	Amended complaint filed

June 18-26, 1997	Non-jury trial before Judge Frank J. Williams
October 23, 1997	Transferred to Washington County
October 24, 1997	Decision of Judge Frank J. Williams denying plaintiff's request for relief and entering judgment for defendants
November 3, 1997	Judgment of dismissal entered
November 12, 1997	Notice of appeal filed
February 25, 2000	Opinion of Supreme Court of Rhode Island affirming judgment of superior court

[Executed August 2, 1983]

PLAINTIFF'S EXHIBIT 4

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL
BIOLOGIST'S FIELD REPORT

Date of Preparation: 28 July 1983

File No.: CRMC #83-3-55

Date of Application: 4 April 1983

Street: Atlantic Avenue & Shore Gardens Road

City/Town: Westerly

Owner's Name: Anthony Palazzolo

Plat No.: 155

Lot No.: 3-14,17-72,75-80

Address: 275 High Street Westerly, RI 02891

Telephone No.:

Contractor: Unknown

Address:

Telephone No.:

Names of Adjacent Waterways: Winnapaug Pond

Nearest Utility Pole #:

Project Type: to construct and maintain a wooden bulkhead; to fill behind said bulkhead and below MHW (salt marsh) to attain elevation 6.5' MHW.

* * *

12. Recommendations:

The proposal, as submitted and illustrated in project plans, is in direct conflict with the policies and regulations of the CRMC Manage-Program [sic] (Chapter 1, Section 110.0-2, Section 120.0-2). Additionally, the applicant has made no attempt to provide information to support the need or justification for the alteration sought; in fact, the alterations proposed (erosion control and shoreline improvements) have little relation to conditions of the site—erosion is not evident. The requisite burdens of proof established by the CRMC Management Program are lacking; evidence that impact will not occur has not been provided.

There is overwhelming evidence that the biological communities indigenous to this coastal wetland will be seriously and deleteriously effected by the proposed filling and bulkheading activities. Valuable wildlife habitat will be destroyed outright, habitat necessary for the survival and maintenance of the shellfish and finfish populations will be lost, and there is a very reasonable probability that a species of bird and two species of plants now listed as Species of Significance by the Natural Heritage Program will be eliminated from the area. The circulation and flushing patterns within this coastal wetland will be altered significantly; with the proposed filling and bulkheading, these patterns will be eliminated. With the type of bulkhead design proposed, there is a likelihood that sedimentation of the waters immediately offshore will occur as fine particles filter through the proposed structure or are washed directly out with each tide. With the loss or reduction of the existing habitat and food values associated with the marsh system, recreational value will be effected detrimentally—there will be a reduction or impact on the resources of the pond (shellfish, fish, etc.).

It is quite clear that the applicant has not demonstrated that there exists a "bona fide benefit to the public" to support the proposed activities and that the alterations "will not signifi-

cantly damage the biologic and/or hydrologic processes within or affecting the wetland". This coastal wetland is not capable of supporting the proposed activities without significant impact, and, for these reasons, this project should be denied.

* * *

[Executed August 10, 1983]

PLAINTIFF'S EXHIBIT 5

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL ENGINEER'S FIELD REPORT

Date of Preparation: August 5, 1983

File No.: 83-3-55

Date of Application: April 4, 1983

Street: Area between Atlantic Avenue and Winnapaug Pond

City/Town: Westerly

Owner's Name: PALAZZOLO, Anthony

Plat No.: 155

Lot No.: 3-14, 17-72,75-80

Address: 275 High Street, Westerly, RI

Telephone No.: 596-5239

Contractor: owner

Address: same

Telephone No.: same

Names of Adjacent Waterways: Winnapaug Pond and extensive associated coastal wetlands, Atlantic Barrier Beach

Nearest Utility Pole #_____

Project Type: To construct and maintain a wooden bulkhead; to fill behind bulkhead to elevation 6.5' MHW. Area to be filled is extensive salt marsh. Restore property lines and prevent erosion.

* * *

2. CORROBORATION OF APPLICATION ENGINEERING DRAWINGS (DISTANCES, ETC.):

Drawings appear very vague and inadequate. For a project of this size and nature, plans are very poor. It is understood that the applicant has spoken with other staff members about the proposal and that better plans could not be obtained from the applicant.

* * *

4. GEOLOGIC AND HYDROLOGIC CHARACTERISTICS

An extensive coastal wetlands system exists on the property. A wide strip of wetlands (700'-1000') borders Atlantic Avenue on the south and the southern shore of Winnapaug Pond on the north. Misquito [sic] ditches, in generally good condition, intermingle throughout the area and allow tidal waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in run-off waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island-like mound exists to the west with elevations of 2'- 5' MHW. A previously filled gravel road (elev. 1-'2' MHW) runs from Atlantic Avenue and terminates in a small turn-around at the shore of the pond. This turn-around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn-around area. No significant erosion we noted along the shoreline and the area is well vegetated. There is, however, shoaling along the southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this area as "Mk, Matunuck mucky peat," characterized

by level, poor drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater-tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

* * *

9. RECOMMENDATIONS

* * *

B) Proposal to fill property to elevation 6.5' MLW: This proposal includes the filling of approximately 18 acres of salt marsh and tidal waters. Existing soils may be used as fill.

This proposal is in direct conflict with the policies and regulations of the R.I. Coastal Resources Management Program for filling of coastal wetlands and tidal waters. Final grades and contours have not been determined. Impacts from runoff, flooding, and biological concerns have not been addressed by the applicant.

C) Proposal to prepare property for use as designated by zoning regulations. ("No sewage disposal systems are being applied for.):

This statement is very vague. Local zoning designates this area as "W1, Residential and other," but this does not mean the town would allow building in this area. Individual septic systems would be required for each dwelling constructed. There are no municipal sanitary sewers in the area. The property has been divided into approximately 70 lots. Under current R.I. Division of Land Resources Regulations, individual septic systems would most likely not be allowed. Regulation SD *15.02 Site Suitability* states, "the installation of an individual sewage disposal system is prohibited in any area where the ground

water table is within 4 feet of the *original* ground surface. . . Approval may be granted in areas where the groundwater table is within 2 to 4 feet of the original ground surface. . ." provided certain design alterations are made. The water table in this area, due to daily tidal innundation, is at or very near the surface. The above mentioned requirements for an ISDS permit must be met before the property is filled.

* * *

DEFENDANTS' EXHIBIT G

COASTAL RESOURCES MANAGEMENT COUNCIL

Re: Anthony Palazzolo
File No: 83-5-55

Thursday, August 18, 1983
Westerly Town Hall
Westerly, Rhode Island
7:30 p.m.

Council Members Present

Joseph F. Turco, Chairman

Barbara B. Colt and .

Donald C. Brown and

John D. Biafore, Esquire

Appearances

Anthony Palazzolo, pro se

Harold B. Soloveitzik, Esquire . . . . . For the Objectors

* * *

[19]

CROSS-EXAMINATION BY MR. SOLOVEITZIK

Q Mr. Palazzolo, what use are you going to make of this land after it is filled?

A Mr. Soloveitzik, I can honestly say I spent twenty years trying to get to the first stage. I haven't given serious thought to the second stage until the first stage—

Q Did you discuss—you said seventy-two lots?

A Platted as such, yeah.

[20]

Q No doubt you propose to sell those lots?

A No, Mr. Soloveitzik, you said that.

CHAIRMAN TURCO: Mr. Palazzolo, just a minute. Let him ask the question. When he's finished asking the question, you answer. If you can't, tell us. Mr. Soloveitzik, proceed.

Q What is the purpose of subdivision?

A That's the way I bought it, sir.

Q And you don't propose to sell lots off this subdivision?

A Not necessarily.

Q Do you propose to build on this property?

A Not necessarily.

Q What is the purpose of filling it, then?

A Because it's my right to do if I want to to look at it it is my business. I don't have a rash answer to answer you. You [are] putting words in my mouth.

Q This is the land, correct?

A Right.

Q You want the right to look at it, is that a correct—

A Whatever.

Q Don't you like the looks of it the way it is?

A Yeah.

* * *

PLAINTIFF'S EXHIBIT 6

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

Date: July 12, 1984

File Number: 83-3-55

To Whom It May Concern:

Attention is invited to the provisions of Section 42-35-15 of the Administrative Procedures Act whereby a final decision in a contested case may be subject to judicial review provided a complaint is filed in the Superior Court of Providence County within thirty (30) days after the mailing of the decision. This thirty (30) day period for the

Anthony Palazzolo, 275 High Street, Westerly, Rhode Island.

case expires on August 12, 1984.

/s/ John A. Lyons

Chairman
Coastal Resources
Management Council

STATE OF RHODE ISLAND
PROVIDENCE, SC.

COASTAL RESOURCES
MANAGEMENT COUNCIL
60 Davis Street, Providence, RI 02908

DECISION

Petition of: Anthony Palazzolo
275 High Street
Westerly, RI 02891

Docket No.: 83-3-55

Applicant, ANTHONY PALAZZOLO, applied to the Coastal Resources Management Council to construct and maintain a pile bulkhead and place fill below Mean High Water (MHW) on Lot Numbers 3 thru 14, 17 thru 22, and 75 thru 80, Plat 155 off Atlantic Avenue, Westerly Rhode Island, with specifications filed by applicant in Notes 1, 2, 3, 4, filed with the application.

A duly appointed Subcommittee held a public hearing pursuant to the Administrative Procedures Act on August 18, 1983, in the Town Hall, High Street, Westerly, Rhode Island. At that time, evidence was submitted by applicant and other interested parties. Further evidence was submitted by staff members of the Coastal Resources Management Council (CRMC) and by other State agencies, all of which was incorporated into the record. All evidence so submitted to the Council pursuant to this application whether it be by interested parties, the applicant, or the Council itself through its own staff members and other State agencies, has been made available and is available for all interested parties at the offices of the Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island.

After deliberating upon all the evidence, the Subcommittee recommended to the entire Council that the application be denied.

Thereafter, the entire Council took under consideration the record, including all evidence and the recommendations of the Subcommittee concerning this petition. After careful deliberation upon same, and after roll-call vote that the record, including all evidence therein, as well as the recommendation of the Subcommittee, was read and reviewed by members of the Council, the entire Council hereby finds:

FINDINGS OF FACT:

1. The applicant proposes to construct a wooden bulkhead type structure approximately 340' long along a portion of the southern shoreline of Winnapaug Pond. The proposed bulkhead retainer consists of a single line of horizontal poles (unknown diameter) connected to vertical poles spaced 20' apart. The vertical poles shall be dug to -4' MLW. The top of the horizontal retainers will be at existing grade (approximately 2.5' MLW).

Also, the area behind the bulkhead, approximately 18 acres of salt marsh is proposed to be filled to an approximate elevation of 6.5' MLW (5' MHW). Existing elevations of the area range from 0' -5' MHW with marsh elevations of 0' -2' MHW. Proposed embankments along property lines are to be graded to approximately 1 vert" 1 horiz. slopes. The applicant proposed to establish a 50' "buffer" upland of the proposed bulkhead. This "buffer" will consist of a 30' level area and then slope upland, 1 vert: 5 horiz. to an elevation of approximately 5' MHW. A previously filled gravel road approximately 50' x 860' runs through the eastern portion of the property. Marsh existing on both sides of this road is to be filled. According to text submitted, "the final grade and contour (of fill), may be altered slightly, to allow for surface water management."

2. An extensive coastal wetlands system exists on the property. A wide strip of wetlands (700' - 1000') borders Atlantic Avenue on the south and the southern shore of Winnapaug Pond to the north. Misquito [sic] ditches, in generally good condition, intermingle throughout the area and allow tidal

waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in runoff waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island-like mound exists to the west with elevations of 2' -5' MHW. A previously filled gravel road (elev. 1'-2' MHW) runs from Atlantic Avenue and terminates in a small turn around at the shore of the pond. This turn around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn around area. No significant erosion was noted along the shoreline and the area is well vegetated. There is, however, shoaling along the southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this areas as "Mk. Matunuck mucky peat," characterized by level, poorly drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

3. Drawings submitted and on file at our office are vague and inadequate for a project of this size and nature. This fact was brought to applicant's attention prior to hearing and has not been addressed by applicant. As a result, the property lines are vague and not specific.

4. Applicant proposes to construct a 1340 foot pole barrier dug into shoreline embankment.

5. Proposal to fill property to elevation 6.5' MLW includes the filling of approximately 18 acres of salt marsh and tidal waters. Final grades and contours have not been determined.

6. Impacts from runoff, flooding and biological concerns have not been addressed by applicant.

7. The effect of 1340 feet of horizontal poles along the shoreline and through tidal waters and wetlands were not addressed by applicant.

8. It is apparent from staff reports that the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond. Such impacts were not addressed by the applicant.

9. Applicant has not demonstrated by a fair preponderance of evidence that the proposed development as submitted will not:

a. Conflict with the Federal & State approved Rhode Island Coastal Resources Management Plan.

b. Make the area unsuitable for any uses or activities to which it is allocated by a CRMC Plan or Program.

c. Significantly damage the environment of the coastal region.

Therefore, based upon the above Findings of Fact, it does not appear that the coastal resources in this immediate area are capable of supporting the proposed activity. Further, there is a complete lack of evidence demonstrating to this Council the need and demand for the proposed activity.

CONCLUSIONS OF LAW:

1. The proposed alteration and activity will conflict with the Coastal Resources Management Plan presently in effect and adopted by this Council.

2. The Coastal Resources Management Council has been granted jurisdiction over this project by reason of Title 46, Chapter 23 of the General Laws of the State of Rhode Island.

3. The applicant has not met his evidentiary burden of proof as required by enabling legislation of the Coastal Resources Management Council (46-23 GLRI) or the regulations of this Council as contained in the Coastal Resources Management Program.

Wherefore, the Council can only find that the applicant has not met his requisite burden of proof, which are clearly set forth in Rules and Regulations of this Council so mentioned above.

Therefore, as a result of these findings of fact and conclusions of law, the Council hereby denies assent of the application for the above-mentioned project.

By the Council,

/s/ John A. Lyons
JOHN A. LYONS, CHAIRMAN

/s/ Paul T. Hicks
PAUL T. HICKS,
VICE CHAIRMAN

/s/ Barbara B. Colt
BARBARA B. COLT,
SECRETARY

/s/ Carolyn F. Brassil
CAROLYN F. BRASSIL

/s/ Donald C. Brown
DONALD C. BROWN

/s/ John Rao
JOHN RAO

/s/ William Miner
DR. WILLIAM MINER

/s/ Charles Ted Wright
CHARLES TED WRIGHT

SAMUEL SNOW

/s/ Joseph Turco
JOSEPH TURCO

/s/ Chester T. Whaley, Jr.
CHESTER T. WHALEY, JR.

/s/ Malcolm Grant
MALCOLM GRANT

/s/ Edward Smith
REP. EDWARD SMITH

[Executed July 16, 1985]

PLAINTIFF'S EXHIBIT 10

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL BIOLOGIST'S FIELD REPORT

Date of Preparation: July 15, 1985

File No.: 85-1-33

Date of Application: March 21, 1985

Street: Shore Gardens off Atlantic Avenue

City/Town: WESTERLY

Owner's Name: Palazzolo, Anthony

Plat No.: 155

Lot No.: (not indicated)

Address: 275 High Street, Westerly RI 02891

Telephone No.:

Contractor/Engineer: Wes Grant III, PE (Environmental Consultants, Inc., W. Kingstown RI)

Names of Adjacent Waterways: WINNAPAUG POND

Nearest Utility Pole #: 184

Project Type: fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use; there will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbeque pits and trash receptacles upon the filled area.

* * *

3. Significant Environmental Features (biological, hydrological, geological)

The site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond.

* * *

Soils of the site are surveyed Matunuck mucky peat, found in tidal marshes and subject to tidal inundation; the daily flooding and high salt content make this soil unsuitable for most uses except as a habitat for saltwater-tolerant wildlife (USDA/SCS Soil Survey of RI, 1981). There is concern as to the ability of wetland soil to sustain proposed fill of this magnitude—potential subsidence of the fill may necessitate additional filling in the future. There is question whether the fill can be contained over time, with the possibility for sedimentation to pond waters by overwash or due to scouring at the toe.

* * *

4. Existing land and water uses (note degree of development):

Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings.

* * *

[Executed July 25, 1985]

PLAINTIFF'S EXHIBIT 9

**DIVISION OF COASTAL RESOURCES—
ENGINEER'S FIELD REPORT**

TYPE OF REVIEW: P FILE NUMBER: 85-1-33

Name: Anthony Palazzolo

City/Town: Westerly

Plat: 155

Lot (s):

Mailing Address: 275 High Street, Westerly RI, 02891

Designer Address: Environmental Consultants, Inc., W. Kingstown, RI

Location Pole: Shore Gardens off Atlantic Avenue

City/Town: Westerly

Waterway: Winnapaug Pond

Barrier Beach: Atlantic Beach

Type: Developed

Proposal: To fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use. There will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbeque pits of concrete and other trash recepticles [sic] upon the filled area. (This application requires a special exception under RICRMP Section 130.

* * *

Distance of Proposal to Coastal Feature and Elevations of Proposal: The max. elev. of the proposed 34,200 cu. yd± fill (11.4 ac±) is indicated to be +3.5' MSL, extending to within 50' of mean low water.

* * *

Engineering Comments

The highly compressible nature of mucky peat (among other poor engineering characteristics) makes this soil complex undesirable for a parking area/roadway base, as there exists the potential for excessive settlement over time. (Possibly requiring additional filling). The R.I. soil survey notes a "poor" rating of Matunuck peat as roadfill (noting wetness). Also, storm surge flooding and recession would cause major sedimentation within the pond.

Presently sediment, transported through the stabilized inlet, is accumulating along the southern shore of the pond as indicated by the increasing size of the flood tidal deltas and decreasing depths. (Boat navigation may be hindered by this condition.) The proposed fill extends to within 50' of MLW. The toe of the proposed, 1:6 sloped embankment is actually at MHW. Even with the proposed conservation mix vegetative cover stabilizing the slope, the close proximity of the toe to the pond may cause sedimentation, erosion, and toe scouring from storm waves and tidal surges.

* * *

PLAINTIFF'S EXHIBIT 11

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

DATE: March 3, 1986

FILE NUMBER: 85-1-33

To Whom It May Concern:

Attention is invited to the provisions of Section 42-35-15 of the Administrative Procedures Act whereby a final decision in a contested case may be subject to judicial review provided a complaint is filed in the Superior Court of Providence County within thirty (30) days after the mailing of the decision. This thirty (30) day period for the

Anthony Palazzolo

case expires on April 3, 1986.

/s/ William W. Miner

Chairman
Coastal Resources
Management Council

STATE OF RHODE ISLAND
PROVIDENCE, SC.

COASTAL RESOURCES
MANAGEMENT COUNCIL
60 Davis Street, Providence, RI 02908

DECISION

Petition of: Anthony Palazzolo
Docket No.: 85-1-33

Applicant, Anthony Palazzolo filed with the Coastal Resources Management Council an application to fill a contiguous wetland adjacent to Winnapaug Pond with clean, bank run gravel to establish a private beach club for seasonal use. The application indicated parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, barbeque pits of concrete, and other trash receptacles would be placed upon the filled area.

The site location is at Shore Gardens off Atlantic Avenue, Westerly, Rhode Island. Applicant applied for a special exception under Section 130 of the Rhode Island Coastal Resources Management Plan.

A duly appointed Subcommittee held a public hearing on this application, pursuant to the Administrative Procedures Act, on July 30, 1985 in the Council Chambers, Town Hall, High Street, Westerly, Rhode Island. At that time evidence was submitted on behalf of the applicant, as well as other interested parties. Evidence was submitted at this hearing on behalf of the Coastal Resources Management Council though various State Agencies and staff members. Further, all evidence so submitted to the Subcommittee pursuant to this application, whether it be by interested parties, proponents or the Coastal Resources Management Council itself through its staff members and other various State Agencies, has been and is available to all interested parties at the offices of the Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island, 02908.

After deliberation upon all the evidence submitted and the entire record, the Subcommittee recommended to the full Council to deny the application.

Thereafter, at a meeting held on November 26, 1985 at the Cannon Building, Providence, Rhode Island, the entire Council took under consideration the record, the evidence therein, and the recommendation of the Subcommittee. The entire Council then heard further testimony from the applicant.

After careful deliberation upon the same and after a roll call vote that all the evidence, record and recommendations of the Subcommittee so submitted were read by members of the Council, the entire Council hereby finds:

FINDINGS OF FACT:

1. The base flood elevation of the area is 15' MSL. The area is in a V Flood Zone.

2. The proposed construction will take place in an extensive coastal wetland system 700' to 1.000' wide, bordering the southe[n] shore of Winnapaug Pond. Existing elevations in the area range from 0-5' MHW with marsh elevations of 0-2' MHW. A previously filled gravel road runs through the eastern portion of the property. The area is adjacent to a large microtidal coastal lagoon complex with extensive salt marsh fring[e] of variable width. The pond is flushed by narrow and shallow stabilized tidal inlet and normal tide range is 2.6' + 1.2' moontide surge. The adjacent tidal marsh is subject to tidal inundation daily.

3. The project proposes extensive filling of the area, including coastal wetlands. The highly compressible nature of mucky peat makes this soil complex undesirable for parking or roadway base. The Rhode Island Soil Survey for the area notes a Poor Rating. Additionally, storm surge flooding and recession would cause major sedimentation within the Pond.

4. There is presently sediment transported through the stabilized inlet, which is accumulating along the shouther [sic] shore of the Pond as indicated by the increasing size of the flood tidal deltas and decreasing depths. The proposed fill extends to within 50' of MLW. The toe of the proposal, 1:6 sloped embankment, is actually at MHW. Even with the proposed conservation mix vegetative cover stabilizing the slope, the close proximity of the tow to the pond would cause sedimentation, erosion and toe scouring from storm waves and tidal surges.

5. The marsh which would be filled under this proposal presently provides refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds. Additionally, mosquito ditching enhances edge through the high marsh area, enabling access of auna [sic] to cover areas and permits the exchange of nutrient/waste products.

6. Filling of the marsh would destroy the natural shoreline protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area.

7. The proposed project is in conflict with the following criteria of the CRMP:

Sect. 130(A)(1):	The proposal must meet the criteria for a Special Exception, whereby the activity servcs "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests."
Sect. 150:	The applicant has proposed a 50-foot "buffer" from the water's edge to the edge of fill. To establish a "buffer" in this case is technically irrelevant in that the salt marsh (coastal feature) itself is proposed to be filled.

Sect. 210.3(C)(1): "The Council's goal is to preserve, and where possible, restore coastal wetlands."

Sect. 210.3(C)(4): "Alterations to salt marshes . . . abutting Type 2 waters are prohibited except for minor disturbances associated with . . . residential docks and walkways . . . and . . . approved construction or repair of structural shoreline protection facilities."

Sect. 300.2(B)(1): ". . . unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms filling . . . is prohibited on . . . coastal wetlands . . . adjacent to Type 1 and 2 waters."

Sect. 300.2(B)(2): "Filling . . . on coastal wetlands is prohibited adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

Sect. 330(A)(1): "The primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coastal region is to retain visual diversity and often unique visual character of the Rhode Island coast . . ."

WHEREFORE, as a result of these Findings of Fact, it appears that the proposed activity will detrimentally impact the coastal resources of this State.

CONCLUSION OF LAW:

1. This Council has been granted jurisdiction over the above-mentioned project by reason of Title 46, Chapter 23 of the General Laws of the State of Rhode Island, as amended.

2. The proposed alteration will conflict with the management plan approved adn [sic] adopted by this Council and presently in effect.

3. The records reflect that the evidentiary burdens of proof as set forth in the Coastal Resources Management Council Program have not been met for this project.

As a result of these Findings of Fact and Conclusion of Law, the Council hereby denies approval to the applicant to undertake the activities contained in the application.

For the Council,

/s/ William Miner
DR. WILLIAM MINER
Chairman

DATED: Feb. 18, 1986

/s/ David Abedon
DAVID ABEDON

/s/ Joseph Nichols
JOSEPH NICHOLS

/s/ Donald C. Brown
DONALD C. BROWN

/s/ George Caruolo
REP. GEORGE CARUOLO

SEN. WILLIAM C. O'NEILL

/s/ Malcolm Grant
MALCOLM GRANT

/s/ George L. Sisson, Jr.
GEORGE L. SISSON, JR.

/s/ Paul T. Hicks
PAUL T. HICKS

/s/ John A. Lyons
JOHN A. LYONS

/s/ Kathryn G. Owen
KATHRYN G. OWEN

SAMUEL SNOW

/s/ Joseph F. Turco
JOSEPH F. TURCO

CHARLES TED WRIGHT

[Filed January 5, 1995]

DEFENDANTS' EXHIBIT III

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

PROVIDENCE, SC. SUPERIOR COURT

ANTHONY PALAZZOLO, :
PLAINTIFF :

V. : C.A. No. 86-1496
:

COASTAL RESOURCES
MANAGEMENT COUNCIL, :
DEFENDANT

DECISION

ISRAEL, J. In this civil action the plaintiff, Anthony Palazzolo, appeals under *G.L. 1956 (1993 Reenactment) § 42-35-15* from a decision of the defendant, Coastal Resources Management Council (CRMC), issued on February 18, 1986, in which the CRMC denied the plaintiff's application to fill a contiguous wetland adjacent to Winnapaug Pond with clean, bank-run gravel to establish a private beach club for seasonal use. The plaintiff's complaint was filed on April 3, 1986. Although the record appears to have been certified to this Court from the CRMC on June 6, 1986, it has since been lost or misplaced. The Court relies for this Decision on so much of the record as is disclosed by the parties in their respective memoranda. In

addition, each of the parties has furnished the Court with such copies of the record as they have in their own respective files.

On March 11, 1993 the plaintiff attempted to withdraw his appeal from the decision of the CRMC "without prejudice to his right to file a new application or proceed with a petition for assessment of damages for inverse condemnation or other compensation under the Constitution of the United States and the Constitution of the State of Rhode Island." The plaintiff appears, however, to have changed his mind, because a briefing schedule was ordered on June 9, 1993. The case was assigned for decision to this Justice on August 11, 1994, but briefing was not finally concluded until October 17, 1994.

There is also pending in the Supreme Court an appeal from the dismissal by the Court under Rule 41(b) of an action in Washington County Superior Court, in which the plaintiff sought to have damages assessed for the inverse condemnation of this land. The motion to dismiss for lack of diligent prosecution and failure comply with the Rules of Civil Procedure and/or orders of the court was granted on January 24, 1994. In that action, filed in June 1988, the plaintiff had joined the CRMC, alleging that its denial of the application, which is the subject of this appeal, constituted part of the deprivation of all beneficial use of his property through strict enforcement of regulations, for which he is entitled to compensation. It is not entirely clear whether the plaintiff perceived an inter-relationship between this action and the Washington County action.

I.

The plaintiff apparently has owned a parcel of land since the early 1960's in the Town of Westerly north of Atlantic Avenue and bordering on the southerly shore of Winnapaug Pond. He applied for the assent of the CRMC early in 1985 to permit him to fill approximately 11.4 acres with approximately 34,200 cubic yards of bank-run gravel. The filling is necessary to create a private beach club to provide a private area for

swimming, picnicking, shellfishing and boating without the erection of any structures on the property. The owner proposed to locate a dumpster on the site from May 1 through October 31, as well as a number of smaller trash barrels at various locations on the property. There would also be parking for fifty cars with boat-trailers, "port-a-johns," picnic tables and concrete barbecue pits on the premises.

The entire land area is part of a statutory coastal wetland. The owner and his engineer proposed in the application to minimize environmental impact by not placing any fill in a fifty-foot "buffer" zone at the shoreline, by grading the slope of the fill from the set-back at a 1' to 6' rise, and by seeding the slope with Soil Conservation Seed grass seed as soon as the filling was accomplished. It was also proposed to control overland drainage of the fill area, itself, by the use of bank-run gravel fill and by contouring the fill inland toward a processed stone filtering bed in the interior of the land area. The owner's engineer claimed that the filling of this area would allow an increased enjoyment of recreational boating, fishing and swimming. He conceded, however, that filling this marshland would have "somewhat of an impact upon the biological communities that exist there now. . ."

The plaintiff's application drew prompt objection from the Town Engineer and the Conservation Commission of the Town of Westerly. The CRMC's staff engineer reported that the proposed alteration to the wetland presented a "significant potential for increased impacts to the pond ecosystem." A qualified biologist reported to the CRMC that the proposal represented "a *direct* loss of salt marsh and its inherent values." (Emphasis in original.) She also described a great number of potential indirect impacts. The proposal also drew objection from the administrator of the Statewide Planning Program and the State Division of Fish and Wildlife.

A sub-committee of the CRMC held a public hearing on July 30, 1985. At that hearing the sub-committee received the negative reports of the staff engineer and the biologist in evidence in the record. The adverse report of the Statewide Planning Program, a favorable report of the Historical Preservation Commission, and the negative report from the State Division of Fish and Wildlife were also received in evidence. The applicant testified in his own behalf and presented testimony from the engineer who assisted in the preparation of his plans. The engineer testified that filling the area was necessary to allow people to park vehicles on the property. He pointed out that people were presently illegally using a private way across the plaintiff's land to gain access to the pond. He acknowledged that the proposal would have an environmental impact on the area. He also acknowledged that there were other public and private accesses to the pond. The only use for the land which would completely reduce environmental impact, according to this witness, would be to leave it in its present state. He had no objection to the reports of the staff engineer and biologist, except that he thought that a layer of stable ground might underlie the surface layer of Matunuck mucky peat, which consists of six to eighteen inches of surpressable [sic] land. The sub-committee heard from some interested members of the public, none of whom favored granting the application. The sub-committee recommended that the CRMC find certain facts and that the application be denied.

On November 26, 1985 the matter came before the CRMC at a regular meeting. The plaintiff was granted leave to present the testimony of Irene H. Stuckey, whose qualification as an expert in the field of environmental plant physiology was unquestioned. She gave it as her opinion that the plaintiff's land is "an extremely valuable salt marsh and should be preserved." She testified that any further filling of the marsh of which the plaintiff's property is a part should be stopped. In her written report, which was received in evidence, she described the marsh

as "extremely valuable in terms of plant species that grow there, and as a habitat for birds." Further, "it is one of the more valuable tidal salt marshes in Rhode Island." The CRMC voted to approve the sub-committee's recommendation that the application be denied. The decision of February 18, 1986 ensued.

In his memorandum the plaintiff contends that the decision of the CRMC was arbitrary, capricious and characterized by an abuse of discretion or a clearly unwarranted exercise of discretion (*§42-35-15(g)(6)*) and was an unconstitutional taking of private property for public use in violation of the Constitutions of the United States and the State of Rhode Island (*§42-35-15(g)(1)*).

II.

As to the first ground, the plaintiff first argues that the CRMC is collaterally estopped from making the following findings of fact:

> "5. The marsh which would be filled under this proposal *presently* provides refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds. Additionally, mosquito ditching enhances [s]edge through the high marsh area, enabling access of [f]auna to cover areas and permits the exchange of nutrient/waste products."
>
> "6. Filling of the marsh would destroy the natural shore line protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area."

He points to what he claims to be a decision of the Chief of the Division of harbors and rivers in the Department of Natural Resources issued on April 1, 1971. In that decision the Chief of the Division purported to grant the plaintiff's 1963 appli-

cation to dredge channels in Winnapaug Pond and to deposit dredged materials on his waterfront land. The Chief found:

> "(6) We find that neither application No. 2 (the 1963 application) nor No. 3 (a substantially similar 1966 application) will have any significant effect on wildlife."

According to the plaintiff's testimony at the public hearing on July 30, 1985, the assent issued pursuant to this purported decision was withdrawn without explanation in the record seventeen days after its issuance. No further action was taken by the plaintiff on this application and the purported, but obviously revoked, decision of the Chief of the Division of harbors and rivers. Nor did the plaintiff make any further explanation on the record of his subsequent proceedings, if any, with regard to this decision and assent.

It is important to note that the 1971 decision and assent were obviously known to and in the possession of the plaintiff at the time of the sub-committee hearing on July 30, 1985 and at the hearing before the full CRMC on November 26, 1985. Nevertheless, he deliberately chose not to produce them, or any other available documentation regarding his 1963 and 1966 applications and their subsequent litigation history. The CRMC was led to believe in 1985 that all the plaintiff expected it to decide was whether or not he was then entitled to special exceptions from the strict requirements of the Coastal Resources Management Program (CRMP) on the basis of the record presented at the hearing. Since the plaintiff was fully aware at that time of the prior findings, which he now seeks to interpose to estop contrary fact-finding by the CRMC, he must be deemed to have waived any possible factual benefit from the 1971 findings. He surely is not claiming now that he wanted to mislead the CRMC or that his failure is due to oversight. After all, he did mention those earlier proceedings in another context at the sub-committee hearing.

It is not necessary in this case to reach the question of whether or not the doctrine of collateral estoppel bars the CRMC from finding the facts it did. Nor need the Court decide whether the decision of the CRMC depends on the facts which the plaintiff claims it is estopped from finding. Two reasons mandate this conclusion.

First, under *§42-35-15* this Court reviews the agency's fact-finding on the basis of the record before the agency. It is the sufficiency of the evidence in the record to support the facts found by the agency which is tested judicially on administrative appeal. *Easton's Point Association, Inc. v. Coastal Resources Management Council*, 559 A.2d 633, 636 (R.I. 1989). Second, the rule that issues not raised before a hearing tribunal will not be reviewed on appeal is especially pertinent when an appellant attempts to raise estoppel issues for the first time on appeal. *See Gross v. Glazier*, 495 A.2d 672, 675 (R.I. 1985). In addition, the Court agrees that a doctrine of collateral estoppel may be applied only with great caution to administrative proceedings for the reasons set forth in CRMC's supplemental memorandum, referring to *Restatement of Judgments, Second* (1982). §83 and comments. Accordingly, the defendant's motion to strike portions of the plaintiff's memorandum is moot, since the Court rules that the issue is not properly raised in this proceeding.

The plaintiff next argues that the CRMC decision was an arbitrary and capricious abuse of discretion because he had established that he had met all the standards for a special exception to the criteria established in the CRMP. Section 130A of the pertinent version of the CRMP provides as follows:

> "A. Special exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the

requirements of this document only if and when the applicant has demonstrated that:

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

(2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.

(3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited."

The CRMC concluded that the plaintiff had failed to satisfy his burden of proof on the record that he satisfied all the conditions necessary to warrant its exercise of discretion to grant a special exception.

The plaintiff contends that his proposal to fill more than eleven acres of coastal wetlands in order to develop a private beach club serves a *compelling* public purpose which provides benefits to the public as a whole. He says that his beach club would be an activity that provides access to the shore for *broad segments of the public*. He further says that there is *no reasonable alternative* means of, or location for serving that compelling public purpose.

The evidence in the record is clear that the public already has abundant access to Winnapaug Pond, including some access over a private way across the plaintiff's land to a boat ramp in its present condition. The CRMC was fully justified in finding

that there was nothing compelling about the public purpose the plaintiff sought to serve. In addition, nothing in the record tends to show that the plaintiff's private beach would provide access to the shore for broad, as opposed to narrow, segments of the public. Finally, the record does not support the conclusion that there is no reasonable alternative to the plaintiff's proposal to serve the purpose he contends to be public. The plaintiff does not show that the public purpose he claims to serve cannot be served by selective development of his land without covering more than eleven acres of a valuable salt water marsh with gravel fill.

In the final analysis, however, this Court is not permitted to substitute its conclusions of fact for those of the agency, where they are derived from the presence or lack of supporting evidence in the record. *Environmental Scientific Corp. v. Durfee*, 621 A.2d 200, 208 (R.I. 1993). The granting of a special exception under Section 130 of the CRMP is an exercise of discretion by the CRMC. In the exercise of that discretion the CRMC is called upon to balance the adverse impact of a proposed activity upon the goals and policies of the CRMC against the public interest served by the activity. *General Laws 1956 (1991 Reenactment) § 46-23-1(a)* provides in part ". . . that preservation and restoration of ecological systems shall be the *primary* guiding principal upon which environmental alteration of coastal resources will be measured, judged and regulated." The CRMC is thereby mandated to give environmental concerns primacy over all other considerations, including even activities serving the compelling purposes described in Section 130. The economic consequences of such a mandate are the subject of the next contention of the plaintiff.

The CRMC's decision to deny this application was neither arbitrary nor capricious, nor was it an abuse of discretion. It was based on the plain weight of the evidence before it that the plaintiff's proposed activity served no compelling public purpose.

III.

As a second ground for reversal of the CRMC decision the plaintiff alleges that he is deprived by that decision of all beneficial use of his property without any compensation in violation of the Constitutions of the United States and the State of Rhode Island. The plaintiff is clearly wrong. If he has in fact been deprived of all beneficial use of his land by the strict enforcement of the CRMP policies without the benefit of the special exceptions he has requested, he may in an appropriate action recover damages for inverse condemnation. *Milardo v. Coastal Resources Management Council*, 434 A.2d 266, 270 (R.I. 1981). *See also*, *Santini v. Lyons*, 448 A.2d 124, 129 (R.I. 1982).

An appeal from the decision of an administrative agency is not an appropriate action in which to determine whether the enforcement of an administrative regulation, from which a particular exception is sought, constitutes a deprivation of all beneficial use of a claimant's property. All that can be decided in this proceeding is that this refusal to grant this particular exception to these policies regarding the filling of coastal wetlands was justified on the record presented.

Even granting that the plaintiff here may have made a showing that there is no permitted use of his land under the CRMP from which he can derive any economic benefit, that showing was totally irrelevant to any issue for decision before the CRMC. Counsel for the plaintiff conceded as much in colloquy with the sub-committee in July 1985, after the plaintiff was permitted to testify over objection that he had offered to sell his land to the State, when he said: "I'm not asking you to take the checkbook out at this time." Since the evidence was irrelevant, the State had no appropriate opportunity or motive to contradict or rebut it. Although the plaintiff's witnesses were allowed to testify that any development at all of the plaintiff's land would adversely impact the environment, none of them

testified that no economically feasible activity could be the subject of a special exception. While it was Dr. Stuckey's opinion that no further filling of the marsh *should be* permitted, she could not testify that none *would be* permitted by the CRMC, if its impact was appropriately minimized or mitigated. In an appropriate timely action the State would be permitted to contradict or rebut the plaintiff's evidence, if it could.

It is true that the original complaint filed in this case on April 3, 1986 did allege generally that the denial of his application constituted an unconstitutional taking for which he did not receive compensation in violation of his constitutional rights. Among his prayers for relief he did seek an adjudication that the CRMC "acted in violation of the plaintiff's constitutional rights." The prayers for relief also claim money damages. Nevertheless, only the utmost liberality in the construction of pleadings would allow a Court or a party to guess that the plaintiff was seeking damages for inverse condemnation under the doctrine advanced in *Annicelli v. Town of South Kingstown*, 463 A.2d 133, 139 (R.I. 1983). The record of this disorganized litigation does not disclose that the defendant ever answered the plaintiff's complaint, but the parties have always, until the plaintiff filed his memorandum on March 8, 1994, regarded this action as an administrative appeal and not a claim for damages for inverse condemnation.

Whether or not that claim was any more or less unambiguously raised in the Washington County case now on appeal in the Supreme Court is beside the point. The parties have consistently treated this action as a pure administrative appeal calling only for a judicial review of the CRMC decision on the statutory grounds provided in *§42-35-15(g)*. It is far too late in this litigation to bring in the State, itself, as a defendant to afford the attorney general an opportunity to represent and defend the General Treasury against the plaintiff's claim for money damages. It may well be that the pending Washington County case

is the last fragile reed upon which the merits of the plaintiff's claim now cling.

As for this action, a judgment will enter for the defendant denying and dismissing the plaintiffs' complaint. The defendant will present a form of judgment for entry on notice to the plaintiff.

[Filed October 23, 1995]

[Caption omitted in printing]

AMENDED COMPLAINT

1. Plaintiff, Anthony Palazzolo ("Palazzolo") is a resident of the Town of Westerly, County of Washington and State of Rhode Island.

2. Defendant, Coastal Resources Management Council (CRMC) is an Authority created as an Agency of the State of Rhode Island by Act of the General Assembly (Public Laws of 1971, Chapter 279). The State is named as CRMC is without capacity to be financially liable for the acts complained of herein.

3. Palazzolo is, and has been the owner, in fee simple absolute of a parcel of real estate (the "Property") located in Westerly, Rhode Island in the vicinity of Winnapaug Pond.

4. In 1960, a sub-division in the Misquamicut area of Westerly, Rhode Island was created. In 1961, Palazzolo purchased a total of eighty lots, six of which were later sold. The Property is properly subdivided and recorded and each lot has been separately taxed for the entire time during which Palazzolo has owned the property.

5. In 1962, Palazzolo applied to the Department of Environmental Management's predecessor agency, the Department of Natural Resources, Division of Harbors and Rivers (the "Division of harbors [sic] and Rivers") for authorization to dredge 60,000 cubic yards of material in Winnapaug Pond (the "1962 Application"). The Division of Harbors and Rivers declined to render a decision.

6. On May 16, 1963, a second application was submitted with revised plans (the "1963 Application"). The Division

of Harbors and Rivers again deferred a decision on the Application.

7. On April 29, 1966, Palazzolo submitted a third application to perform the necessary grading and dredging of the pond area in front of his property to develop and maintain a swimming area (the "1966 Application"). This, too, was denied.

8. In August of 1966, Palazzolo filed a Complaint in Providence County Superior Court appealing the denial of the 1966 Application of the Division of Harbors and Rivers. Because the administrative record was insufficient for the purposes of judicial review, the case was remanded for hearing and findings of fact.

9. On or about April 1, 1971, upon re-hearing, the Division of Harbors and Rivers *approved* the 1963 and 1966 Applications and instructed Palazzolo to advise within sixty (60) days as to which plan he intended to adopt.

10. Palazzolo complied with the terms of the approval and advised the Division of Harbors and Rivers that he wished to adopt his second plan dated May 16, 1963, the 1963 Application. Although his applications had been approved, several months would pass before the Division of Harbors and Rivers issued its formal Assent. Inexplicably, without comment, the Division withdrew its approval seventeen days after issuing its Assent.

11. On or about June 15, 1985, Palazzolo submitted to the Council his fifth and last application (the "1985 Application") to put his property to some beneficial use. The 1985 Application was designed to minimize the impact on the environment and proposed far less development than that proposed in Palazzolo's earlier applications. Palazzolo's application proposed to fill a contiguous wetland adjacent to Winnapaug

Pond with clean, bank run gravel to establish a beach club for seasonal use only.

12. The Council voted to deny Palazzolo's 1985 Application. The decision was based, *inter alia*, on the Council's belief that Palazzolo's property provided "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading binds [sic]."

13. The Plaintiff has exhausted all available administrative remedies as provided by R.I. Gen. Laws § 42-35-1 *et seq.*

COUNT I
(INVERSE CONDEMNATION)

14. Plaintiff reincorporates paragraphs 1 through 13 as if fully realleged herein.

15. As a result of the CRMC's denial of Palazzolo's right to develop the property, Plaintiff has been denied economically, beneficial use of his property from the time it was purchased in1962, to the time this suit was instituted and *in futuro.*

16. But for the CRMC's prohibition on development of the property, the Plaintiff would have been able to develop his property as planned and such development was within the ownership rights of the Plaintiff.

17. As a direct and proximate result of the Defendants' refusal to allow any development of the property, there has been a taking of private property for public use without just compensation.

18. The Defendants' acts, and the resultant denial of economically beneficial use of the Plaintiff's property without compensation, is in violation of the Fifth Amendment of the United States Constitution and Article 1, Section Sixteen of the Rhode Island Constitution.

WHEREFORE, the Plaintiff respectfully asks that this Court:

1. Award Plaintiff any and all damages suffered as a result of the taking of their property as alleged herein;

2. Alternatively, award Plaintiff the Fair Market Value of their property as damages for the taking as alleged herein;

3. Award Plaintiff interest on such damages from the date of taking;

4. Award Plaintiff attorneys' fees and costs pursuant to 42 U.S.C. Sec.s [sic] 1983 and 1988; and

5. Grant other relief as this Court deems just.

Respectfully submitted,
Anthony Palazzolo
By his Attorneys,

/s/ John B. Webster
JOHN B. WEBSTER (#3586)
RESNICK, CAFFREY
& WEBSTER
300 Centerville Road
Suite 300 Summit West
Warwick, Rhode Island 02886
Tel: 401-738-4500
Fax: 401-738-5892
Date: [10/20/95]

[Served September 3, 1996]

[Caption omitted in printing]

PLAINTIFF'S ANSWERS TO DEFENDANT STATE OF RHODE ISLAND'S INTERROGATORIES TO PLAINTIFF

* * *

6. State, in your opinion, the total value of the land you claim was taken together with all abutting land owned by you at each of the following times: (a) immediately before the time of the alleged taking; (b) immediately after the time of the alleged taking.

Answer:
Approximately $9,000,000 immediately before the taking and $25,000 immediately after the taking. The Plaintiff refuses to include the value of "abutting land."

* * *

8. a) State and itemize the total amount of just compensation you allege is due for the alleged taking.

Answer:
Eighty lots with a fair market value of (averaged) of [sic] $112,000 less $10,000 for each lot in development costs.

b) If you seek any additional amounts of money in this action, itemize and explain.

Answer:
Interest on the taking from March 5, 1986 approximately $9,072,000 plus legal fees which will be itemized and submitted at the appropriate time.

* * *

[Served June 14, 1997]

[Caption omitted in printing]

PLAINTIFF'S SUPPLEMENTAL ANSWERS TO DEFENDANT STATE OF RHODE ISLAND'S INTERROGATORIES

* * *

6. State, in your opinion, the total value of the land you claim was taken together with all abutting land owned by you at each of the following times: (a) immediately before the time of the alleged taking; (b) immediately after the time of the alleged taking.

Answer:
Value of land: $125,000 per lot prior to taking; [n]one or nominal value after the taking.

8. a) State and itemize the total amount of just compensation you allege is due for the alleged taking.

Answer:

125,000 per lot -	9,250,000.00
25,000 development	1,850,000.00
	7,400,000.00
Interest	9,768,000.00
Total	17,168,000.00

* * *

[Taken June 20, 1997]

DEFENDANTS' EXHIBIT W

[Caption omitted in printing]

Deposition of RUSSELL J. CHATEAUNEUF taken on behalf of the Defendants on Friday, June 20, 1997, at the offices of Goldman & Biafore, 101 Dyer Street, Providence, Rhode Island, commencing at 12:15 P.M. before Rebecca J. Harrison, Notary Public

APPEARANCES

John B. Webster, Esquire ..... For the Plaintiff

Goldman & Biafore
By: Brian Goldman, Esquire ..... For the Defendant (CRMC)

Department of Attorney General
By: Michael Rubin, Esquire ..... For the Defendant (State of R.I.)

* * *

[3]

RUSSELL J. CHATEAUNEUF,
C-H-A-T-E-A-U-N-E-U-F, having been duly sworn by Notary Public, testifies as follows:

EXAMINATION BY MR. RUBIN

* * *

[9]

Q Am I correct in describing that this plat depicts a number of individual lots on the south side of Winnapaug Pond, north of Atlantic Avenue?

A Yes.

Q Okay. And have you gave any consideration to—

MR. RUBIN: Strike that.

Q If an individual were to develop this subdivision as depicted on this plat and were to do so in the time period of roughly 1983 and the individual were to comply with the law, the individual would have had to go to what was then the ISDS section of DEM, correct?

A That's correct.

Q Which is the function you now supervise?

A That's correct.

Q And what would that individual have to have done?

A The individual would have had to have complied with Section 18, S.D. 18 of the rules concerning subdivision suitability approval.

[10]

Q Would it help you to refer to the rules?

A Sure.

Q Okay. And the rules that you're referring to are the regulations that we've discussed earlier in this deposition?

A Yes.

Q Okay. And what would such compliance have entailed?

A Well, they would have been required to submit an application in accordance with that section of the rules, Section 18, via topographic map of details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and, if necessary, also assessment on environmental impacts.

Q Okay. And in order to go forward with actual construction, he would have to have obtained from that section what?

A He would have had to have obtained a subdivision suitability determination from the Department that indicated that the lots were suitable for sewage disposal.

Q Okay. And how about with respect to the [11] construction of any one particular individual system?

A In order to actually construct the ISDS system on any lot, they would first have to obtain an individual lot approval for that individual sewage disposal system prior to installation.

Q And what criteria and factors would that have entailed?

A It would have entailed all of the items indicated in Section S.D. 2.02 of the rules concerning application for approval of a new sewage disposal system. The general types of information that must be submitted for that application is a plan showing the property lines, the topography of the land, any nearby wells, drinking water wells and wetlands, the locations of testing work on the soils, which is necessary to determine the soil type, and the watertable depth, it would indicate the approximate location of the home, or that dwelling proposed, and various details on the septic system design pursuant to the rules.

Q So, if I understand you correctly, in order to proceed the actual construction of septic systems on the individual lots that are shown on the plat [12] that you have in front of you, which is a Shore Gardens plat of 1959, you would, essentially, have to get two approvals, or would have had to get two approvals at that time, one being a subdivision suitability approval, the other being an individual design approval; is that correct?

A That's generally correct. You mean if the petitioner wanted to build one house and presented a plan and said I only want to build one house, they could forego the subdivision suitability process and go right to the design phase for the individual sewage, for the single individual sewage disposal system, that is an option.

Q Understood. So with respect to developing a subdivision of this sort, and let us suppose that there were 74 available lots on the subdivision plan before you, being the Shore Gardens subdivision, one would essentially have to successfully complete that, get 75 approvals, one being the overall subdivision suitability determination, and then 74 individual approvals?

A That's correct, in order to build on 70—ISDS systems on 74 individual lots, yes.

[13]

Q Okay. And generally, if one, if a petitioner or applicant intended to develop more than one individual lot in the subdivision within a time frame of several years, such applicant would find it efficient to get the suitability determination first; isn't that correct?

A That's correct.

Q What would happen if a petitioner or applicant were to attempt to develop a subdivision of the sort presented by

the Shore Gardens plat in 1959 one lot at a time, bypassing the subdivision suitability determination?

THE WITNESS: May I refer to the rule?

MR. RUBIN: Yes, please do.

A In answering that question, I'm going to point you to the definition of subdividing as contained in the rules, Section S.D. 1.31, which defines subdivision of a piece of property for the purposes of these regulations "shall be held to mean the division of a lot, tract or parcel of land to three or more lots, sites or other division of land for the purpose, whether immediate or future of building development, or three or more contiguous recorded lots under [14] common ownership," so using that rational[e] if an applicant comes to us and shows a large parcel of land and wishes to divide it into two pieces, they would not require subdivision suitability, but if they were to divide it into three pieces, then it would require a subdivision suitability. If they came to us one at a time, then at the point where they came in for the third dwelling, we would say you need the subdivision suitability.

Q I understand. Very good. So if the person claiming ownership of this land were to have approached you during the time period we're talking about, when I say you, I mean the ISDS section, attempting to market, develop and market these parcels in that time frame, he or she would not have gotten past the second lot, in essence, without undergoing suitability determination?

A That's correct.

Q Okay. Assuming that the area that is platted here is coastal marsh and assuming that it is frequently inundated by the tide at high tide, and assuming further that one would have to bring in fill material in order to develop this [15] property at all, or this area at all, and assuming the

use of clean bank gravel to a height above two feet above the watertable and assuming conventional engineering and design of septic systems as available at that time, in 1983 what would be the consequences of a subdivision suitability application and what would be the consequences of the individual lot applications?

A Well, first of all, I'd say that in order to really properly assess the feasibility and approvability under the regulations of installing and operating septic systems on 74 of these lots, you know, the applicant would first have to demonstrate compliance with the regulations, and, as you stated in your question, there are quite a few pieces of information that would have to be submitted, and each standard of the regulation has to be evaluated with respect to the actual conditions on the site. Typical items that would be looked at would be, in terms of site suitability, is does the site have two to four feet of dry soil above the watertable which would allow design and construction of a septic system, is there a 50-foot horizontal separation distance [16] to any wetland, is there adequate land area on each lot to site a septic system in compliance with the sizing requirements given by the rule. I mean, these would be the factors that would be evaluated during the permitting process.

Q With respect to allowance of systems within 50 feet of a wetland, based upon horizontal measurement can one deviate from that by variance?

A It is possible under the rules to request a variance or a waiver from that requirement, provided that the applicant can demonstrate that the public health and the environment will be protected.

MR. RUBIN; Do you have of [sic] the '83 application materials.

MR. GOLDMAN: It's right in front of you, Mike.

Q Would the information that I just gave you in my hypothetical have been sufficient for you to make an evaluation for, and if not, what further information would you need?

A Well, clearly I need a plan that would show various pieces of information as required by the [17] rule on the plan so we could get a clear picture of what the physical characteristics were of the site and characteristics of the proposal. In addition to that, there would be information shown on that, on that plan that would indicate the locations of certain testing work, such as percolation testing, watertable depth and so forth; if it's not directly in the plan, it would be referenced to other documents that contain that information, so these are critical pieces of information that must be submitted.

Q So, based on what I told you, would you be able to reach a conclusion, any conclusion at all as to the likelihood of an acceptance or a rejection?

A Like I said, I think you need to go through an application process in order to determine the acceptability, or the unacceptability of that proposal.

Q Okay. If somebody were to construct with septic tanks of a conventional type on 74 of the lots shown there—

MR. WEBSTER: Septic tanks or ISDSs?

Q ISDS systems, and excluding the parcels 74, 73, [18] 1, 2, 15, 16, and if one were to construct such an ISDS system on each of those other parcels, and if there are 74 such other parcels and if such septic systems were for a conventional design prevalent at that time and if such septic systems were to be constructed in an area to be filled with clean bank-run gravel to an elevation of 6.5 feet above the mean high tide line, and if, of course, accompanying

residences to take advantage of those systems were to be constructed and if we were to assume a conventional three-bedroom residence accompanying each system, what would be the effects of such construction at the wetland edge, or at the edge of Winnapaug Pond?

A Well, I couldn't say, you know, with preciseness what the effect would be without specific information concerning exact distances between septic systems and the water bodies; exact design information for, exact design information concerning each of the septic systems. I would have concerns about development at that density on a parcel like this based on the limited knowledge I have of the area. We have undertaken [19] other permitting activities in the Winnapaug area, but we have evaluated or looked at issues such as the distance, such as the distance from the septic system to the ponds, and one of the primary concerns in this particular area is the nitrate loadings to the pond.

Q Go on.

A So, you know, we would have concerns concerning nitrate loading and we would have concerns with respect to, from a public health perspective, ensuring that the waste is properly treated before reaching any water bodies.

Q And do you have any estimates, however qualified, as to the level of nitrate discharge that you would realize into the water body from the hypothetical that I described based on this plat?

A No. Based on my experience with nitrate impacts, there would be a significant increase in the nitrogen loadings to the groundwater over typical background levels.

Q And are you able to quantify that?

A I'm not able to exactly quantify that at this point, but a rough estimate in the order of 20 to 30 milligrams per liter, it's possible with this [20] kind of density.

* * *

[Held June 18-26, 1997]

TRANSCRIPT OF PROCEEDINGS

[Caption omitted in printing]

* * *

APPEARANCES:

John B. Webster, Esq ..... Counsel for the Plaintiff
Patricia J. Petrella, Esq ..... Counsel for the Plaintiff
Michael Rubin, Esq ..... Counsel for the State
Brian Goldman, Esq ..... Counsel for CRMC

* * *

[1:1]

WEDNESDAY, JUNE 18, 1997

* * *

[1:12]

[MR. WEBSTER:] You need fill for an ISDS, you need fill to be able to construct homes. But do you do anything else with it? The property is indeed a coastal wetland, you Honor. It is on a barrier beach. We take no issue with that. I'm not even going to take issue with the environmental consequences that will occur as a result of our development.

* * *

[1:44]

ANTHONY PALAZZOLO, Having first been duly sworn, testified as follows:

* * *

[1:63]

EXAMINATION BY MR. WEBSTER

* * *

[1:71]

Q Who has paid the taxes on this property since 1959?

A I have.

THURSDAY, JUNE 19, 1997

* * *

[1:73]

CROSS-EXAMINATION BY MR. RUBIN

* * *

[1:74]

Q And what they refused you was the same thing, essentially, that you went to the Coastal Council with in 1983?

A Correct.

Q And you say that what the Coastal Council did [1:75] constituted a taking of your property?

A Well, I think that's a—I feel that since they didn't let me use it, I paid for it. I paid taxes on it. I feel that I had a right to use it, providing it caused no harm.

Q In any event, that's what your lawyer is alleging in this case; correct?

A Correct.

Q Okay. But that's the same thing that happened to you back in 1970, isn't it?

A Correct.

Q Okay. So what happened to you back in 1970, that was a taking of your property, too, wasn't it?

MR. WEBSTER: I'm going to object, your Honor.

A That has to be—I don't understand that.

THE COURT: Why?

MR. WEBSTER: The basis of my objection? I think, and I appreciate my brother's skills of advocacy, but we all know the *Williamson Doctrine*. He's argued it here. You have to keep applying.

THE COURT: Sustained. It's calling for a legal conclusion anyway.

* * *

[1:141]

GROVER JOHN FUGATE, having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[1:144]

Q Tell me what the 1983 application was for.

A A review of the records shows that the '83 application was for a filling of a coastal salt marsh and filling below the mean high water mark onto the State property for ostensibly to slow erosion. There was no other uses applied for.

Q And how is the area described with reference to the mean high tide line?

A The area that the proposed filling was to occur covered extensive areas of the salt marsh, and also extended

beyond the salt marsh outward to a bulkhead line that was to be established out in Winnapaug Pond and filling of that area below the mean high water mark.

Q What does the application itself say with reference to [1:145] the mean high tide line?

A The application indicates that there will be a filling of about—of approximate elevations, 6.5, above the mean low water mark, and which would translate to five feet above the mean high water mark. Existing elevations range from zero to five feet mean high water, with marsh elevations of zero to two feet mean high water.

Q What does the initial application say with respect to the mean high tide line in the area where the marsh meets the open water?

A The application proposes to fill that area up to an elevation of approximately five feet mean high water. It creates a new mean high water mark out in the pond out to a bulkhead line that would be established as part of this application.

Q So from the face of the application itself, what can you determine about what was intended with respect to areas below mean high water?

A There was an intent to fill below mean high water and create an upland area out of what was formerly state property.

Q Now, can you describe that application in terms of its specificity, in terms of its purpose?

A The application is extremely vague in terms of its [1:146] engineering requirements, in terms of the application itself, in terms of the potential uses that might be to the property. It merely says that they want to fill this area for erosion control.

Q What kind of engineering went into that application?

A Well, the engineering itself, there is some rudimentary diagrams which show some various sketchy details of the bulkhead. Basically, it looks like a plat map or maybe an old previous engineered plan of the area showing the area to be filled with very little engineering detail on the actual wall construction, fill profiles, existing contours, existing coastal resources, wetland edges. All this stuff is—

Q Let me stop you. The things that you just enumerated—go on. Maybe I shouldn't have stopped you. What were you going to say? All that stuff is—

A All that material is typically required for applications.

Q And to what extent is it present on this application?

A It's nonexistent.

Q Okay. What about grading plans?

A There are none.

Q Okay.

A There is no revegetation plans. I mean, I can go through the provisions of the plan and indicate [1:147] typically where we would get this type of information. The application will have to address Sections 120 if they are requesting variances from the standards. And there is a series of burdens of proof that they would have to meet.

If there is a special exception request, they would have to document the nature of the special exception and how they felt they met the burden of proof. If there were —this application would require variances under Section 140, which is the setback provisions. It would also require variances under Section 150 of the buffer provisions, and it would also have to address the policy

concerns under 200.2, which is for activities adjacent to Type II waters.

It would have to address policy concerns for 210.2, which is the barrier section. It would also have to address the policy sections for 210.3, which is the salt marsh provisions. And it would also have to address 300.1, which is the general category of beach requirements that all applications are required to address for a category of the applications. 300.2, 300.3 for the—300.2 is for the filling, grading, removing of the coastal features. 300.3, well—300.7, sorry, for structural shoreline protection. And 310 for the filling of intertidal waters.

[1:148]

Q That's 300.10?

A Yes, it is.

Q Okay. Now, when you say "address," what do you mean by address?

A Well, the applicant, there are certain burdens and standards, certain engineering requirements that have to be met in certain sections, and they have to explain how the application meets those policy concerns. And if it has not met them, how they would mitigate and deal with the issues that come out of those policy issues.

Q Based upon that administrative record, would the CRMC have known what he wanted to do?

A Based on the administrative record, the Council just had a vague notion that Mr. Palazzolo wanted to fill the area. In fact, the Council tried to elicit on cross-examination Mr. Palazzolo's intent. And I have the transcript from an '83 hearing here. They were—a question was asked of Mr. Palazzolo what he intended to do with this, and he said, "I can honestly say I've spent twenty years trying to

get to the first stage, meaning the filling of the area, and that I haven't given serious thought to the second stage."

Q That's fine. We went over some of that testimony this morning. But aside from that transcript, was there any other source from which the Council, or what other [1:149] sources would the Council have been able to define what Mr. Palazzolo intended to do here?

A In his application it's supposed to address what he intends to do and all the applicable standards and policy concerns under those sections.

Q And to recapitulate, that was not done?

A That was not done. In fact, if one is to read a—I'll just—under the findings of fact here, this is number three, and the decision that was issued on the '83 application. "Drawings submitted and on file in this office are vague and inadequate for a project of this size and nature. This fact was brought to the applicant's attention prior to the hearing and has not been addressed by the applicant. As a result, the property lines are vague and not specific." And then it goes on to address other concerns.

Q Okay. What evidence is there in that administrative record indicating he wanted to build a subdivision?

A None that I can see.

MR. RUBIN: Just for the record, we saved some time and agreed that exhibit number J would come in full. That's Mr. Fugate's CV.

Q And excuse me for belaboring this because it's important, but what evidence is there in that application that he wanted any of the following things: [1:150] 74 dwellings, 74 ISDS systems, or that he wanted to build homes at all?

A There is no evidence indicating in this application that that was requested by the applicant. In fact, the applicant, in presenting testimony, was pretty vague about the description other than he just wanted to fill the property because that was his right to fill the property. That he had no plans beyond that.

THE COURT: Is there a requirement, Mr. Fugate, that someone going in for filling indicate what they intend to do with it?

THE WITNESS: Yes, your Honor. Under 300.1, they have to describe the need for the project and what—I can actually read from the program here.

THE COURT: Is this from the regulations then in existence?

THE WITNESS: Yes, it is. It's 300.1, Category B, Requirements. "Describe the need for the proposal activity or alteration." And then you have to go on and describe also along with that a series of other requirements to demonstrate that all applicable zoning ordinances, building codes, flood hazards, all safety and fire codes and environmental requirements will be met.

THE COURT: But he already indicated that his [1:151] purpose, from what you've been able to giean from this, was to prevent erosion.

THE WITNESS: The application went far beyond erosion control. The application was for the filling of tidal waters, which was far beyond what is necessary for erosion control. In addition, both staff reports and the Council's findings indicate, and being familiar with the site myself, there is a very low erosion concern with this property at all. So that would raise a flag to the Council as to what the nature of this application was for. Certainly, the amount of fill that was being brought on the

property would not warrant erosion control. Six feet of fill is not necessarily for erosion control.

Q If he had applied for CRMC's assent to a subdivision development of residential homes, would you have considered that—to what extent would you have considered that application without perk tests, for instance?

A If this was for a subdivision, either that or a residential dwelling, this application, as presently presented, could not be accepted by the Council because it's deficient in prerequisite applications. Prerequisite permits, I should say.

Q Would you have even held hearings on it?

[1:152]

A No. It should not have gone to hearing if it was for a residential structure or subdivision because there were prerequisite permits missing.

Q Tell us about those prerequisite permits.

A One of the prerequisite permits is indicated in 300.3 and 320, is if the application involves the installation of ISDS's, which are individual sewer disposal systems, requires that those permits be obtained and be part of the application. If freshwater wetlands is to be filled or there is contiguous freshwater wetlands, those permits will also have to be obtained.

As part of the filling of the submerged lands, an Army Corps permit for that is a prerequisite. That's an Army Corps permit under Section 10 and 404, which would also invoke the State's 401 certification during that process, and the ISDS would also trigger the 401 water quality certification.

Q What about the EPA?

A EPA, the National Range Fishery Service, Federal Fish and Wildlife. There are five agencies that sit down to review 404 permits. The EPA has a veto provision on 404 for wetland filling situations that they can exercise. So they are part of the review process when a 404 permit is applied for, and they can potentially veto that permit.

[1:153]

Q I want to put you in the setting of 1983. What were the requirements at that time?

A For this, those were the requirements.

Q Those were the requirements, okay.

MR. WEBSTER: Objection. Could we just lay a foundation for that? I'm a little confused exactly where because he wasn't even program director. And I want to make sure he knows what all of the program requirements were.

Q To what extent do you have familiarity with the program requirements of these other agencies as they were constituted in 1983?

A I'm familiar with the requirements of the Clean Water Act as it related to the program and the Army Corps program. The Army Corps program Section 10 permits have been required ever since the 1800's. When the Harbors and Rivers Act came into effect, it was delegated to the Army Corps.

The EPA 404 and 401 are part of the 1971 Clean Water Act, so they were present at the time when the Clean Water Act was adopted. This was part of the program requirements. In fact, it was required in the federal statute to implement the Clean Water Act as part of our regulatory requirements.

Q And so the testimony that you gave a few moments ago [1:154] with respect to the pre-program requirements was testimony that you understood to be in response to an inquiry with respect to 1983?

MR. WEBSTER: Objection. I withdraw my objection, Mike.

MR. RUBIN: Okay, thank you.

Q I just want the record to be clear.

A Yes.

Q Okay, very good. If in 1983 an applicant had come to the Coastal program seeking permission to develop residences, and if that particular design, that particular plan had already been rejected by the ISDS section of DEM and that rejection still stood, what would have been the response of the Coastal Council?

A They would not have accepted the application.

Q Would it have—to what extent would it have been possible for an applicant in 1983 to obtain CRMC assent to fill an area, then go to the ISDS section and get septic permits, and then commence building?

A It wasn't done. The Council application process requires that they have a prerequisite permit; i.e., the ISDS permit has to be in place prior to the acceptance of an application for residence or a residential subdivision.

* * *

[1:174]

Q Okay. Let me ask you a basic question. The area in [1:175] question in this particular case, is there any upland in that area?

MR. WEBSTER: I object to form. As of when?

Q Well, let's say as of now.

A There is upland portions to the site, and there was at the time of the application based on aerial photo analysis.

Q What do you mean by upland?

A That portion of area above the mean high water mark is usually substantially dry, except for extreme coastal storms.

Q Now, I'm familiar with zoning practice, and I know the terms of variance and special exception with respect to zoning practice. Do those two words have the same meaning?

A I think they are probably reverse.

Q At the Coastal Council they are reversed?

A I think in terms of burdens, a special exception is a tougher burden to meet than a variance.

Q At the Coastal Council?

A At the Coastal Council.

Q But in general zoning practice, it's the opposite?

A I believe so.

Q Okay. With respect to the development of the upland portions of the parcel, or the area in question in this [1:176] case, which of those standards would have applied in 1983 with respect to the plaintiff?

A For the upland portions, it's a variance.

Q And how about in 1985?

A Again, in 1985 the plan did not change. It would have been a variance.

Q It would be a variance today as a matter of fact, right?

A That's correct.

Q Did Mr. Palazzolo ever submit a plan that was restricted to the upland portions of the property of the area?

A There was no record of such a plan.

Q Ever?

A Ever.

Q Do the upland portions of the area in question in this case contain or comprise sufficient square footage such that one could fit the footprint of a house?

A Provided that a septic system of suitable design, yes, I think you could probably fit a residential structure on that site.

Q But that was never applied for?

A No.

Q Oh, I've heard a lot about the need for a public purpose or a compelling public purpose from Mr. Webster. To what extent does that standard apply to a variance?

A It doesn't apply to a variance. It applies to a special [1:177] exception.

* * *

[1:182]

Q Could you be kind enough to compare those applications with the applications that were submitted to you?

A The applications, there were three applications that were submitted from what we can tell from the record. The first two applications are essentially the same as the '83 application. One small difference, with a second application that was filled in that there are channels that were to

be cut into the property and that the dredge material would be deposited.

But if you are to look at the boundaries, the bulkhead construction, the platting that existed in the '83 and the earlier applications, the '60's, '63, I believe they are essentially the same. And the lateral one is essentially—rough description of the '85 [1:183] application and one in '66.

* * *

[2:197]

FRIDAY, JUNE 20, 1997

* * *

CONTINUED CROSS-EXAMINATION
BY MR. WEBSTER

* * *

[2:201]

Q Now, once again I want to bring you back to standing at the gate.

A Yes.

Q If we look off to the right,—

A Right.

Q —what do you see there?

A There are two homes.

Q Did you take a look at those homes when you were out there?

A Briefly.

Q Okay. Are they on fill?

A They are on upland area, old fill.

Q But it was filled?

A It was filled.

* * *

[2:222]

Q Okay. So for him to do anything with the property, he's got to go to CRMC and say, my private use of this property is now irrelevant because I wanted to use—I have to use it to serve a compelling public purpose to benefit the community; isn't that right?

A The prohibited activities are there to safeguard for spill-over effects and to adjacent coastal areas wherever prohibited.

Q I understand. We agree that it's prohibited for him to fill this coastal feature; correct?

A Under the plan it is, yes.

Q Well, under the program?

A Yes.

Q Okay. So for him to do anything, he needs a special exception?

A To fill the wetland, yes.

Q Okay. To do that, he has to demonstrate that whatever he does with it will serve a compelling public purpose?

A That's a burden he has to demonstrate before the [2:223] Council.

Q Further, the activity must be one or more of the following: An activity associated with public infrastructure, such as

utility entity communications and transportation facilities; isn't that right?

A Yes.

Q We've already decided that housing is not deemed to be a compelling public purpose, have we not, Mr. Fugate?

A No. But road systems are.

Q Well, you say no. Didn't CRMC recently rule that housing, even public housing, does not serve a compelling public purpose?

A Correct.

Q You folks have ruled as a matter of law or problematic [sic] requirements that housing in and of itself doesn't serve a compelling public purpose?

A Correct.

Q And the only way he can put houses on his property is to serve a compelling public purpose; correct?

A Correct.

Q And the other use is a public beach, a beach club; correct?

A That's what you are saying under the zoning ordinance. There may be other uses permitted under the program.

Q I've asked you to assume that, but if that is correct, [2:224] he would also need to demonstrate a compelling public purpose; correct?

A For the filling of marsh.

Q Right. And there is no doubt in 1995 you knew he wanted to put a beach club there?

A '85.

Q I'm sorry, '85. There was no confusion about what he wanted then, did he?

A He indicated, yes, he wanted to put a public beach, I mean a private beach facility.

Q A beach club, right?

A Yes.

Q And he was going to have port-a-johns and some pavement, and some fill, right?

A Yes.

Q And the Council denied that because, in the Council's opinion, according to the record, a beach club didn't serve a compelling public purpose either?

A A private beach club; correct, for the filling of wetland.

* * *

[2:237]

Q Okay. To your knowledge, has the State condemned any property existing uses; a house, a business, an ISDS system, in the area adjacent to my client's property?

A To my knowledge, no.

Q No one has in the State of Rhode Island done that, have they?

A To my knowledge, no.

Q Now, you mentioned the Carr house, and we agree that the Carr's house is on fill; correct?

A It's on a deposit, yes.

Q All right. And we know that that house was built when, sir?

A There was a structure that was—existed prior in the '50's that was taken out by Hurricane Carol in 1954. It was a subsequent structure that was reconstructed in the 1960's, and that structure then was moved onto piles [2:238] and shifted off as foundation to the new piles somewhere around 1985. '84, '85, I believe, could be '86.

Q The house was originally built prior to the existence of CRMC?

A Yes.

* * *

[2:247]

Q And for me to be able to put fill in there, I have to prove that this house is going to serve a compelling public purpose?

A If they meet the burdens under 130.

Q And we agree that not only under the regulations themselves, but Coastal has already made a decision that housing does not serve a compelling public purpose; correct?

A Correct.

Q And we also agree that Council has ruled that a beach club doesn't serve a compelling public purpose?

A That particular proposal, that's correct.

* * *

[2:335]

DAVID F. TWOMBLY, Having been duly sworn, testified as follows:

* * *

[3:350]

TUESDAY, JUNE 24, 1997

* * *

[3:358]

CROSS-EXAMINATION BY MR. RUBIN

Q Mr. Twombly, your expertise doesn't extend to giving opinions as legal title, does it?

A No. Certainly, I'm not an attorney.

Q Okay. And you referred to the area in question as [3:359] Mr. Palazzolo's property at several times during your examination. You were using that phrase broadly; correct?

A Yes. Actually, title is held with the Shore Gardens, Inc.

Q And indeed, you are not really in a position today to give us a legal opinion as to whether it's even with Shore Gardens, Inc; is that correct?

A From the legal title opinion, no.

Q Okay. And, in fact, in your search of the land records, as you testified that you did, over my objection on direct, you encountered a deed from a Shore Gardens, Inc. to a Shore Gardens, Inc.; correct?

A That's correct.

Q Okay. So, insofar as your search of the title might have revealed, there are two Shore Gardens, Inc.; correct?

A I don't know, as I've made that assumption. It was basically a deed, a quitclaim deed, claiming or transferring whatever rights one entity had to another.

* * *

[3:361]

Q Okay. Now, at or around that time, Shore Gardens, Inc. made some deeds out; correct?

A Yes. There were a series of transfers that were dated 1959, '60, and one in '61.

Q Okay. And, for instance, there was a transfer out to Garofalo; correct?

A Yes.

Q December 3rd, '59. There was a transfer out to Mr. Urso, also December 3rd, '59; correct?

A The transfer to Urso was December 3rd, '59. My notes indicate that the Garofalo transfer was December 31st of '59.

Q Was that December 31st?

A Yes.

Q Okay. Maybe my notes are in error. In any event, they deeded one lot; Shore Gardens, Inc., the entity, deeded one lot to Mr. Urso; correct?

A That's correct.

Q And then deeded one lot to Mr. Garofalo; correct?

A Yes.

Q And then deeded one lot to Mr. Gencarella; correct?

A Yes.

Q My notes show December 4th, 1959.

A I show July 6th, 1960.

[3:362]

Q That might have been a record date, though?

A Yeah. I have the separate record dates for these as well.

Q Okay.

A I'm giving you the actual date on the deed.

Q Okay, very well. And then there was a deed to somebody by the name of Serra, S-E-R-R-A; correct?

A That's correct.

Q Right? And that was around June 1st, 1960?

A That's the date I have, yes.

Q Okay. And then in September 8th, 1960, a deed to Levcowich was recorded; correct, Book 80, page 318?

A September 8th is a recording date. The date of the deed was August 6th, '59.

Q And in fact you might know that's the former town clerk in Westerly.

A I do not know that.

Q Okay, very well. And then Shore Gardens, Inc. also deeded some lots to two gentlemen by the name of Algiere; isn't that correct?

A That's correct. That's right.

Q Okay. And you can correct my spelling, but for the stenographer's benefit I think it's A-L-G-I-E-R-E?

A That's correct.

Q Okay. Presumably, Shore Gardens, Inc. received value [3:363] with respect to each of those transfers; correct?

A I would presume so, yes.

Q And indeed those lots have been put to valuable use; correct?

A I would actually have to refer to the tax records or to the recent aerial photos to verify that.

Q Okay. But your testimony was that certain neighboring properties were used in a single family residential home fashion; correct?

A That's correct.

Q And it would be possible, would it not, that some of those properties that you are referring to as being used in that fashion are in fact the very properties that we've just referred to as having been deeded?

A I'm sorry, could you ask that again?

Q Okay. It very well could be that the properties that are in fact being used in the neighborhood for single family residential homes are the properties which we've just referred to in enumerating the deeds; correct?

MR. WEBSTER: Your Honor, I'll object to the question.

THE COURT: The form is a little troubling to me.

MR. RUBIN: I'll withdraw it.

MR. WEBSTER: And also, to make it easy, I will stipulate that some of those properties were in fact [3:364] —I don't believe all of them are, but I really don't know. But I believe some of them were. If that stipulation could save some time.

MR. RUBIN: I believe it does.

MR. WEBSTER: If you know the number, I'll stipulate to the number. I just don't know how many were built upon. Three of four at least.

* * *

[4:463]

WEDNESDAY, JUNE 25, 1997

* * *

[4:493]

DAVID S. REIS, Having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[4:496]

Q And can you describe the natural resource values of Winnapaug Pond?

A The natural resource values of wetlands are—have been broken out into common areas. And, in terms of those common areas, the ones that I would associate with Winnapaug Pond, it would be fish and wildlife habitat values. There would be sediment and pollutant removal abilities within Winnapaug Pond. There would be nutrient removal abilities of wetlands within Winnapaug Pond.

The wetlands of Winnapaug Pond would provide production exported, export, which is the—basically photosynthesis providing plant matter which enters the pond to begin the food web. The wetlands within Winnapaug Pond provide sediment and stable and shore mechanisms, and they provide for recreation.

Q What kind of habitat is provided by Winnapaug Pond?

A Well, there are various types of habitat. There is the open water habitat, which provides habitat for fish, including, I guess, there are 39 species documented within Winnapaug Pond. It provides habitat for waterfowl and for various shore birds, and also for other types of birds such as king fishers and that type of thing.

Q What about agriculture in Winnapaug Pond? Can you tell [4:497] us about that?

A There are permitted agricultural activities within Winnapaug Pond.

Q Shellfish?

A The agriculture activity currently occurring, there is a shellfish production activity.

Q And shellfish found in Winnapaug Pond would include such things as quahogs?

A It would include quahogs, soft shell clams, muscles [sic], scallops.

Q Okay. And what kind of species of fish would be found in Winnapaug Pond?

A Through surveys, DEM, Division of Fish and Wildlife, has provided reports to CRMC which document the existence of 39 species; such things from blue fish, to striped bass, tautog, pollack. Again, 39 species.

Q Flounder?

A Flounder is included in that list.

Q Do any of these species have commercial value?

A Yes, they do.

Q What about the species that don't have commercial value, what values do they have?

A Well, there are species that have commercial value, and normally the species that have commercial value are also of recreational importance. And the species that would [4:498] not be considered to either have commercial or

recreational importance are normally important as a food source for those species that do have commercial recreational importance.

Q Would the big fish eat the little fish?

A Pretty much, yes.

MR. WEBSTER: So stipulated, your Honor.

THE COURT: In life, too.

MR. WEBSTER: I'm sorry, Judge?

THE COURT: In life, too.

Q Can you make specific reference to the salt marshes in Winnapaug Pond and describe how they would contribute, if at all, to the habitat and survival of the species that you've just referred to?

A Yes. First of all, the salt marshes provide primary production. They provide nutrients and lock up organic carbon into plant matter which then provides the basis for the food chain for those fish right up from the hisser plants, phytyl plant, up to the smaller fish, and then of course the larger fish. They are very important habitat for a lot of the smaller food fish or for ink fish we call them, for those species, which are at the top of the food chain which provide commercial and recreational importance.

Q What other types of natural resource values do the salt [4:499] marshes bordering Winnapaug Pond provide?

A Again, I guess I mentioned those when I mentioned the values, natural resource values of Winnapaug Pond. But again they provide fish and wildlife habitat, and they perform various functions, okay. And I mentioned those functions such as sediment removal, pollutant removal, access and nutrient removal, and that type of thing.

Q Okay. Nutrient removal, why is that a good thing? I thought nutrients were good?

A Nutrients are good in the proper balance. But if nutrients become out of balance with the environment, they can cause significant problems.

Q And would those problems include eutrophication?

A Yes, it would.

Q Could you explain that briefly?

A Eutrophication is a condition where nutrients cause excess growth within the pond. Starting with the bottom of the food chain, normally you would have phytoplanting blooms. And those phytoplanting blooms would cause other problems such as decreased light penetration into the water column, which then would cause—would not allow plants at the bottom of the pond to receive enough light to survive. When one of those phytoplanting blooms pass, which they do, they are relatively short lived, that material within the water column would [4:500] settle to the bottom and decompose causing anoxia, which is a lack of oxygen. It would also change the bottom habitat type.

Q And what would that do the species that spawn or thrive in Winnapaug Pond?

A Well, the shellfish at the bottom of the pond, and many of the fish in the water column, would be killed during an anoxic event where the oxygen and the water level decreases to the point that it cannot sustain them.

Q Do all of the fish species that live in Winnapaug Pond stay in Winnapaug Pond?

A No, they do not.

Q Okay. Would they migrate out to the open ocean?

A Many of the species would migrate to the open ocean.

Q And among those species that might migrate, are there any commercial or recreational valuable species?

A Yes, there are.

Q Could you just give us one or two examples?

A Striped bass, blue fish, flounder, tautog, pollack.

Q The species that you just mentioned, which also live in the open waters of the ocean, can those species thrive and reproduce without locations such as Winnapaug Pond?

A The element of many of those species are dependent upon estuaries, such as Winnapaug Pond, for their early life stages where they can find adequate food and cover for [4:501] that period of their life.

Q How many acres was Mr. Palazzolo proposing to fill in 1983?

A I believe it was eighteen.

Q And what percentage of the total acreage of salt marsh bordering Winnapaug Pond would be lost to this one project?

A Twelve percent.

Q Do you have an opinion as an environmental scientist what would be the impact of losing twelve percent of the salt marsh habitat bordering Winnapaug Pond?

A I do.

Q And what is that opinion?

A Twelve percent of the loss of the salt marsh within an estuary such as Winnapaug Pond is a highly significant number. I believe losing twelve percent of the marsh

would result in the incremental loss in the productivity of the pond.

Q And that loss of productivity, I assume, would affect which of the values that you just had referred to in your testimony?

A Well, in terms of productivity, specifically I would be speaking of the—going right up the food chain from the plant matter that's produced by the salt marshes which provides food for small fish, phytoplankton, and [4:502] some of their earlier live forms of the larger fish.

Q With regard to your opinion that a twelve percent loss in salt marsh would have the impact that you described, are you aware of any studies that would support your conclusion?

A Yes. I found within CRMC's database a 1971 study that was performed by DEM Division of Fish and Wildlife. Back then it was the Division of Natural Resources. And they concluded that the loss of those eighteen acres would constitute a significant impact on the productivity of the pond.

Q Now, do you view each site in isolation, or do you take into account cumulative impact?

A We look at the individual aspects at each site and consider that. But we also normally take it a step beyond and have to look at the cumulative impact to the adjacent areas.

Q Now, did you consider any affects of the—let me stop there. Your testimony up to now with respect to the impact of Mr. Palazzolo's project has focused on what aspect of the proposed development of the site? Has it been just the fillings?

A The filling itself.

Q Okay. Above and beyond the filling itself, did you consider what impact 74 ISDS or septic systems would [4:503] have?

A I did perform some nutrient loading calculations.

Q Okay.

A As to the nature of that impact.

Q All right. And did you have occasion to look at the deposition of Russell Chateauneuf, hitherto marked as W1?

A No. I did not.

Q Okay. What figure did you use as the nutrient loading figure with respect to 74 septic systems?

MR. WEBSTER: I object to form.

MR. RUBIN: He can explain, your Honor.

THE COURT: Do you understand the question?

A I think he's looking for the nutrient loading factor. And in this case it would be the nitrogen loading factor. The nitrogen loading factor that I used was 38 milligrams per liter.

Q And how did you arrive at that?

A The loading factor of 38 milligrams per liter was taken from a review of the literature and appeared to be a mean value, and also in discussions between our office, CRMC, and DEM. It's a figure that the agencies, through the technical review committee, agree should be used for performing nitrogen loading calculations.

Q And what calculations did you perform on that figure?

[4:504]

A I performed a set of nitrogen loading calculations for this subdivision as proposed with 74 units over the area of the site, which I estimated at 24 acres.

Q And did you arrive at another figure as a result of that?

A Yes. Going through the calculations, I determined that the loading—the end loading factor through this analysis was approximately 22.4 milligrams.

Q And is that the method that you used a common practice for evaluating nitrogen loading from ISDS's?

A Yes. It's a fairly simple method. You look at the initial loading factor of 38 milligrams per liter, you look at the size of the site, and you look at the recharge to that site from precipitation and from the ISDS flow. And it's commonly utilized. It's utilized by CRMC and DEM staff for environmental evaluations and by other states.

Q Okay. And so that final figure that you mentioned was 22 milligrams per liter?

A Yes. 22.4.

Q 22.4?

A Correct.

Q How does that compare to the federal drinking water standard for ground water?

MR. WEBSTER: I object.

[4:505]

THE COURT: Why?

MR. WEBSTER: Foundation.

THE COURT: Do you know?

Q Are you familiar with the drinking water standards for ground water?

A Yes.

Q How does the figure you just gave us compare to the questioned federal drinking water standard for ground water?

A Ten milligrams per liter of nitrate is the federal drinking water standard for ground water.

Q So this is roughly two and a half times greater?

A Correct.

Q I'm going to show the witness W1.

MR. WEBSTER: Which is?

MR. RUBIN: Rush Chateauneuf's deposition.

Q And ask you to read pages nineteen through twenty of that deposition.

THE COURT: How are we getting this in through this man on someone else's deposition?

MR. RUBIN: He's going to compare the figure that he's using to the figure that Rush Chateauneuf gave.

THE COURT: Well, then ask it hypothetically. I wouldn't use someone else's deposition in these circumstances.

[4:506]

MR. RUBIN: It's actually testimony. But in any event,—

THE COURT: Either way.

Q I wanted to ask the witness if his figure of 22 grams was consistent with the figure Mr. Chateauneuf came up with.

THE COURT: Well, why don't you say that?

MR. RUBIN: All right.

Q If Mr. Chateauneuf came up with an estimate of nitrate discharge with respect to a particular project, this particular project, of twenty to thirty milligrams per liter, can you compare your estimate to that hypothetical estimate?

A Well, my estimate of 22.4 is within that realm.

Q Okay. And how would the nitrogen loadings that you've referred to affect the ecology of the area?

A Nitrate is a nutrient that's an essential nutrient for plant growth and for phytoplankton, and algae growth. But again, it needs to be provided in the proper balance. The concentration of nitrate, nitrogen, Winnapaug Pond is approximately—let me look up the number. I believe it's approximately .05 milligrams per liter as determined by the salt pond watchers, okay, and that's relatively low. We are talking about comparing 22.4 milligrams per liter to .05 milligrams per liter.

[4:507]

It's pretty apparent that that level of loading is highly in excess of what the system is used to, and that would—that high level of loading would cause the eutrophication in the pond and the symptoms that go along with that.

Q And would those effects just be concentrated in the immediate vicinity of Mr. Palazzolo's site?

A Normally you would expect some localized effects at the discharged location along the site boundary. But no, you would also expect those nitrates to spread throughout the pond to the circulation patterns within the pond and cause impact in other areas of the pond as well.

Q That 0.75 figure that you referred to, does that have a name or a particular place in the literature?

A Actually the 0.75 figure is another figure that's provided by one of our references that is used. It's a figure provided by Wetzel in a text entitled, 'Limnology.'

And, according to Wetzel, that's a concentration which causes the eutrophication in estuarial waters. Comparing 22.4 milligrams per liter to .75 milligrams per liter provided by Wetzel, it's approximately thirty times higher than Wetzel's figure.

Q Thirty times higher?

[4:508]

A Yes.

* * *

[4:511]

Q Okay. And can you tell us what an intertidal marsh is?

A An intertidal salt marsh is an area that is affected by the tide. All salt marshes are entire tidal [sic] salt marshes.

Q And has the legislature come up with a list of species that are coincident with intertidal salt marshes?

A Yes.

Q Okay. A list of species that are prima facie [sic] evidence of the existence of prima facia [sic] salt marsh?

MR. WEBSTER: I object and stipulate to the fact that this is an intertidal salt marsh. I thought we had already done that.

Q Did you look for those species on this site?

A I looked for species that would indicate where the mean high water mark and below was.

Q Okay. What species are consistent with locations below the mean high tide line?

[4:512]

A The primary species that is a very clear indicator of where the mean high water mark is, is spartina alterniflora. And that's the species I was looking for.

Q Why this spartina alterniflora? Maybe you can spell it for the stenographer.

A It's spartina, S-P-A-R-T-I-N-A, alterniflora, A-L-T-E-R-N-I-F-L-O-R-A.

Q Why is spartina alterniflora found in areas below the mean high tide line?

A That's the area where this particular plant is specifically adapted to, very specifically.

Q Did you find any of that plant on the site?

A Yes.

Q By the way, is that plant one of the plants that was listed by the legislature?

A Yes.

Q Okay. Now, you have in front of you T1; is that correct?

A Yes.

Q Okay. This is one of the items that Mr. Tait just testified to; correct?

A Correct.

Q Okay. Did you make any notes as to the location of spartina alterniflora on the day that you accompanied [4:513] the DOT survey crew?

A Yes. I had prepared an official map from an aerial photograph, okay, and then we went out to the site. And based on that map went to those specific areas and surveyed the elevations within a spartina alterniflora, and also tidal pool areas.

Q And did you find—did you map the areas of spartina alterniflora?

A Yes. I prepared a very rough map from an aerial photograph.

Q Okay. And did you keep notes of the locations where shots were taken and the correlating vegetation with respect to the location of those shots?

A Yes, I did.

Q Okay. Now, looking at T1, were any of those elevations listed, locations where you encountered spartina alterniflora?

A Yes.

Q And how are the locations where you have encountered—did you have occasion to review this map before this testimony today?

A Yes, I did.

Q Okay. And did you have occasion to make any—to observe the marking patterns on the map?

A Yes.

[4:514]

Q Okay. In fact, did you insist in enhancing some of those markings on the map?

A Yes.

Q Is there any special way in which locations with spartina alterniflora are designated on that map?

A Yes, there are. They are marked in green.

MR. RUBIN: Can I approach, your Honor?

Q Now, there has been some testimony by Dr. Spaulding that based on a—the meconic cycle, the current mean high tide line for the area in question would be measured—would be 1.70 NGVD. Can you compare the locations where you have found spartina alterniflora to the number 1.70 in terms of elevation?

A All the areas that I find spartina alterniflora, except for some places where I found the short form of spartina alterniflora, were at 1.7 or below.

Q So your—to what extent do your observations, your botanical observations, bear out 1.70 as the current mean high tide line for the area in question?

MR. WEBSTER: I object, your Honor. I know there is no foundation that's been laid for this question. Where I sense where he's going, he's trying to prove that because of the existence of this species of flora, that that's where the mean high water mark is, I think we all know.

[4:515]

THE COURT: Well, I think all you are going to get out of this man is that it's indigenous to just below the mean high water mark, right?

THE WITNESS: Correct.

* * *

[4:518]

CROSS-EXAMINATION BY MR. WEBS[redacted]

* * *

[4:521]

Q And you agree with me, would you not, that in order to receive a special exception, my client needed, in 1983 and in 1985, as well as today, he needed to demonstrate to the Board that his use of that property will serve a compelling public purpose?

A Correct.

* * *

[4:522]

Q Would you agree that under CRMC's program that housing does not serve a compelling public purpose?

A Yes.

Q As a matter of fact, CRMC has made such a ruling before that housing, in fact, public housing, doesn't serve a compelling public purpose?

A They have made that determination, yes.

Q Recently?

[4:523]

A Yes.

* * *

[4:532]

Q What do you mean by removing sediments?

A Sediments in the water column that get up into a salt marsh would normally settle out within the salt marsh and

be removed from the water column. It serves as a filtering mechanism.

Q Does that provide benefit to the public as a whole?

A I would say yes.

Q Would you also agree with me that my client's property is aesthetically pleasing?

A In my opinion, yes.

Q It's open, natural, provides a visual vista for beach people, a visual easement?

A I would agree that it's aesthetically pleasing, yes.

Q And that's one of the goals of CRMC, is to protect these —aesthetically protect the environment?

A It is part of the program, yes.

Q And we do that so the general public, the people in the State of Rhode Island, can come down and look at an area [4:533] that's as pretty as my client's?

A Correct.

Q So that everybody can enjoy the property that he owns; correct?

A Yes.

* * *

[4:577]

ALFRED G. THIBODEAU, Having first been duly sworn, testified as follows:

[4:578]

DIRECT EXAMINATION BY MR. RUBIN

Q You are an attorney, Mr. Thibodeau?

A Yes, I am.

Q Okay. And do you do title work?

A Yes, I do.

Q Okay. And do you—are you affiliated with any title insurance companies?

A I am authorized by, or actually I'm a policy writing agent for Commonwealth Title Lawyers Title and Money Guarantee. I'm a licensed attorney to provide certificates for all other major companies operating in Rhode Island.

MR. WEBSTER: Your Honor, I'll stipulate to Mr. Thibodeau's qualifications in the field of title examination.

THE COURT: All right.

MR. RUBIN: Very good.

Q And have you had occasion—an occasion to review the title of the site which is the subject of this Court action back to 1959?

A Yes, I have.

Q And insofar as record title is concerned, who is the owner of record?

A The unknown stockholders of Shore Gardens, Inc., a forfeited Rhode Island corporation, subject to the [4:579] claims of any creditors that might be out there.

Q And the property as, insofar as listed in the land evidence records of the Town of Westerly, shows the property in the name of whom?

A The corporation, Shore Gardens, Inc.

Q There has been testimony in this case that Mr. Palazzolo acquired title in 1959 by virtue of a deed from he and Mr.

Urso to Shore Gardens, Inc. Do you agree with that proposition?

A Yes.

Q Do you agree that the title went into Mr. Palazzolo at that time?

A Well, half interest on the property was conveyed to Mr. Palazzolo.

Q And then what happened?

A It was practically immediately conveyed by Mr. Palazzolo and the owner of the other half interest to the corporation, Shore Gardens, Inc.

Q And is that a transaction by which Mr. Palazzolo himself in his own individual capacity acquired title to the property?

A No. That's—that's the action whereby he divested his interests in the property and conveyed it to the corporation.

Q Okay.

[4:580]

MR. WEBSTER: Your Honor, my brother wants to take one of my letters and introduce them into evidence.

MR. RUBIN: Your Honor, this relates to the interrogatories. If I may explain, the interrogatories were answered sort of in a sequential form, and the culmination of the answers was this letter from Mr. Webster to me. It's UU. And I would like to have it admitted in full.

MR. WEBSTER: Just simply put, my brother had—was unclear of certain dates of acquisition, so I sent him a letter answering his question.

THE COURT: Any problem with your letter being full?

MR. WEBSTER: No. That's the first time I've ever had anything of mine introduced in evidence.

THE COURT: Maybe soon that will reach the value of Abraham Lincoln's correspondence. Full. Mr. Thibodeau, what would be required for this land to be conveyed to another party?

THE WITNESS: Standard practice in Rhode Island would require an action in Superior Court naming all of the parties in interest with service, either actual service or public service, at the discretion of the trier of fact or trial judge to get everybody before the Court and decide who the stockholders were, whether or [4:581] not there were any debts, and make a determination of who the stockholders were.

Q And wouldn't notice have to be given to the world?

THE COURT: Well, at least the Division of Taxation are going to want theirs.

* * *

[4:582]

Q All right. Now, whoever acquired title on the date of the transaction to Shore Gardens, Inc., which I believe is the third list of listed transactions, did such entity then proceed to deed out?

A Yes. If you look at the chain of title to the various lots in the subdivision, there is a series of conveyances where a total of eleven lots were sold out, five of which were then reconveyed to the corporation.

Q Okay. Let's get to that.

A The net result, there were six lots conveyed out.

Q Okay. And showing you a packet that consists of RR, QQ, OO, PP, SS, and I believe that's TT, can you confirm that those are certified copies of those deeds?

A Yes. Those are six deeds that were conveyances by Shore Gardens, Inc. to third parties of lots on this plat.

* * *

[4:584]

Q And I would just like you to briefly look at and identify Exhibit VV. Exhibit VV is a deed from Ernest Algiere and George Algiere to Shore Gardens, Inc. which has been recorded in Book 100 of page 524 and purports to convey five lots back to Shore Gardens. Okay. And the date on that is the 15th of May, '69?

[4:585]

A Correct.

* * *

CROSS-EXAMINATION BY MR. WEBSTER

* * *

[4:592]

THE COURT: This is all the more reason why Mr. Thibodeau would insist on an action to acquire title in view of two corporations that may not have been related, and a deed from Mr. Palazzolo thinking he was still a corporation, sending one deed from one Shore Gardens to another. When in fact that first one was dissolved and a second one perhaps having no relationship with him whatsoever was in existence. And this is a title examiner's nightmare. And that's why if I were a title company, I

wouldn't issue title one on this property unless there is an action to acquire title.

* * *

[4:593]

REDIRECT-EXAMINATION BY MR. RUBIN

Q If the stockholders of the second Shore Gardens, Inc. somehow acceded to title, when would their date of acquisition have been at the earliest?

A At the time of the forfeiture of the second corporation.

Q And wasn't that indeed a revocation in approximately 1969 or '78?

A The Secretary of State's Office shows it as a revocation on February 27, 1978.

Q Okay. And so that would be the date when such stockholders would have received title?

A Correct.

Q Okay. At the earliest?

[4:594]

A At the earliest.

Q Okay.

A Individually as individuals, yes.

Q And would such individuals, as the record now stands, have record title?

A No, they don't.

* * *

[4:632]

THURSDAY, JUNE 26, 1997

* * *

[4:661]

THOMAS S. ANDOLFO, Having first been duly sworn, testified as follows:

DIRECT EXAMINATION BY MR. RUBIN

* * *

[4:677]

Q Okay. And that would be what you would realize net of all of the costs and discount factors that you've testified to?

A They would be the implied value of the lot going through this particular scenario of development. So, when we look at the highest and best use analysis, when I talked about financially feasible uses, this would be one scheme that an appraiser would look at to test whether or not such a development would be financially feasibly [sic].

In my opinion, the net overall value of $55,000 when you are going to expend in excess of four million dollars in construction costs, would be a great folly [4:678] because there is too much risk involved for this type of development just to translate to a nominal $55,000 value. So what that tells me is that maybe there is another scheme of development that would translate into a high value for the property, other than a massive residential subdivision as we are proposing for the site.

Q I'll get to that in a moment. If one were not to take into account the parcels shown on what has been marked as FFF as 126, 125, 120, 119, 98, 97, 98, excuse me, 98, 97, 96, and 95, if those were eliminated from your evaluation,

how would that tip the balance between proceeds and costs?

A Well, I didn't do that analysis. But just looking at, you know, the lots that you are pointing out, I would probably say that most likely I would come up with a negative value if those were taken out.

Q And showing you that which has been marked EEE, and asking you as a separate and independent question, if you were to take out of your valuation or take out from the lots that are salable, the area formed by 143, 142, 141, 140 and 139, how would that affect the balance between proceeds and costs?

A Well, again, it would most likely lower value expectations. So, at 55,000, I don't know how much [4:679] lower I could go, but we would probably show that if those lots were eliminated, that, you know, this project would be totally infeasible due to the fact that there would not be sufficient value taken.

* * *

[4:681]

Q And how would that affect your ultimate conclusion as to value as to whether it would be a positive number or a negative number?

A Well, again, extending this off an additional two years, if we went from three years to five years, you are going to have, you know, more, more cost associated with bringing this particular development to completion. So therefore I would dare to say that you would have a significant negative number as opposed to a positive number, nominal positive number as we have here.

Q Did you hear Mr. Clarke testify this morning?

A Yes, sir.

Q Okay. Were you in the Courtroom?

A Yes.

Q Okay. Did you here him testify with respect to something that could be done notwithstanding the Coastal Resources Management Council permitting requirements in the vicinity of Lot 127?

A Yes.

Q Okay. Lot 127, as shown on EEE and FFF, okay. And did [4:682] you hear him testify with respect to the comparative infrastructure that would be needed to service such an isolated single family home?

A Yes.

Q Okay. Do you have any cost or valuation analysis with respect to February 18th, 1986 with respect to such a design?

A Yes.

Q Can you tell us what that is?

A In my conversations with Mr. Clarke, I asked him what it would cost to access that lot through the existing gravel road that is there. And he provided me with a total cost for road upgrade and engineering of $39,000. So looking back at February 18th, 1986, if we had one buildable lot on that site, what I would do is assign a $100,000 value to that particular lot minus out the cost of engineering that Mr. Clarke provided. And then I would also assign to the site a value for excess land area in the sense that, you know, instead of having one house lot now on, let's say an acre of land, we have one house lot on a parcel, which is essentially twenty acres in size.

So what I would do is provide a contributory value of the excess land in addition to the implied value of that single family house lot. And what I did was I [4:683] looked at essentially nineteen acres of excess land at $7,000 per acre, which translates into $133,000, and I added to that the cost or the value of that one site, taking into account the cost to upgrade. And that amounted to 61,000. So when we add the two up, I have a total value of $194,000. So in my opinion, if I could just continue.

Q Please do.

A Again, getting back to highest and best use analysis, when we look at financially feasible uses, here we have a fifty lot subdivision where the development costs are extraordinary. And there is a very, very high risk, that, you know, something could go wrong; maybe the market will change and that you won't sell off as many lots as you are anticipating. Altogether a value of just $55,000.

When going back to that same time period, you have the ability to utilize a site for just one house lot and extract from that particular parcel a higher value than doing something of this significance. So, it would be in my opinion as an appraiser that given the development costs of this particular subdivision, that I would not opt as that being a financially feasible use.

From my perspective, I would just look at it as one house lot on essentially a twenty acre parcel, and [4:684] assign a value as of February 18, 1986 of $104,000.

Q And I notice that in coming up with that $194,000 figure, insofar as you testified, you didn't mention that that lot in particular would be right on the pond. Did you factor that in, or—

A Well, again, based on my 1986 analysis for the subdivision, I gave the larger lots a value of $100,000.

* * *

(6)

NOV 22 2000

Supreme Court, U.S.
FILED
NOV 22 2000

No. 99-2047

In the

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S BRIEF ON THE MERITS

JAMES S. BURLING
Counsel of Record
ERIC GRANT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932
Counsel for Petitioner

61 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of the property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 1

A. The State of Rhode Island Has Refused to Allow Mr. Palazzolo to Develop His Property 2

B. The Rhode Island Courts Have Refused to Award Damages for the Taking of Mr. Palazzolo's Property 7

SUMMARY OF ARGUMENT 10

ARGUMENT 10

I. MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE 10

A. Because the Type and Intensity of Development Legally Permitted on Mr. Palazzolo's Property Is Perfectly Clear, This Takings Case Is Ripe for Review 11

B. None of the Reasons Adduced by the Lower Court Detracts from the Conclusion That the Case Is Ripe 14

1. The "Point" of the Ripeness Doctrine in Takings Cases 15

2. The Pointlessness of an "Additional Applications" Requirement in Many Cases 16

TABLE OF CONTENTS—Continued

Page

II. THE EXPECTATIONS AND RIGHTS TO MAKE ECONOMICALLY VIABLE USE OF PROPERTY DO NOT DISAPPEAR MERELY BECAUSE TITLE HAS PASSED TO A NEW OWNER 20

A. This Court Has Previously Rejected the Notion That Notice of a Preexisting Regulation Allows Government to Take Property Without Compensation 22

B. If the Promise of the Takings Clause Is to Retain Meaning, Then a State Cannot Acquire Substantial Interests in Real Property Without Cost 23

1. The History and Structure of the Constitution Are Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation 24

2. A State Cannot Acquire Private Property by the Simple Expedient of Redefining the Title 26

3. The Acquisition of Property Carries with It the Reasonable Expectation That the Property May Be Put to Economically Viable Use 27

C. Other Courts Have Followed the Logic of *Nollan* and Have Rejected the Notice Rule 31

D. If the Government Is Not to Obtain an Unjust Windfall at the Expense of Property Owners, a Subsequent Owner of Regulated Property Must Be Able to Pursue a Regulatory Takings Claim 33

TABLE OF CONTENTS—Continued

Page

III. PROPERTY DOES NOT HAVE ECONOMICALLY VIABLE USE JUST BECAUSE IT HAS A NONZERO VALUE 36

A. *Agins* and *Lucas* Mandate That a Taking Should Be Found When There Is a Denial of Economically Viable Use and Land Must Be Retained in Its Natural State 38

B. Mr. Palazzolo Has Been Denied a Reasonable Return on His Property and Has Been Denied Economically Viable Use of His Property 42

C. The Conversion of a Substantial Portion of Mr. Palazzolo's Property into a Nature Reserve Has the Same Effect as a Physical Invasion 44

D. Under the Balancing Test of *Penn Central*, Mr. Palazzolo Has Stated a Claim for a Regulatory Taking of His Property 47

1. Mr. Palazzolo Has Suffered a Severe Adverse Economic Impact 48

2. Mr. Palazzolo's Investment Backed Expectations Have Been Severely Curtailed 48

3. The Character of the Government Action and the Purpose of the Regulations Suggest a Taking Has Occurred 49

CONCLUSION 50

TABLE OF AUTHORITIES

Page

Cases

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 15-16

Agins v. City of Tiburon, 447 U.S. 255 (1980) 39, 41, 47

American Savings and Loan Association v. County of Marin, 653 F.2d 364 (9th Cir. 1981) 46

Armstrong v. United States, 364 U.S. 40 (1960) 21, 49

Babbitt v. Youpee, 519 U.S. 234 (1997) 47

Barney & Carey Co. v. Town of Milton, 87 N.E.2d 9 (Mass. 1949) 31

Boise Cascade Corporation v. Board of Forestry, 935 P.2d 411 (Ore. 1997) 46

Bridge Company v. United States, 105 U.S. 470 (1881) 45

Carson Harbor Village, Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 32

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 40

Cottonwood Farms v. Board of County Commissioners of the County of Jefferson, 763 P.2d 551 (Colo. 1988) 32

Del Monte Dunes at Monterey, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) 32, 40

TABLE OF AUTHORITIES—Continued

Page

DiBattista v. Rhode Island,
717 A.2d 640 (R.I. 1998) 9

Duke Power Co. v. Carolina Environmental Study Group, 438 U.S. 59 (1978) 15

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989) 44

Filister v. City of Minneapolis, 133 N.W.2d 500 (Minn. 1964), *cert. denied*, 382 U.S. 14 (1965) ... 31, 35

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,
482 U.S. 304 (1987) 46

Florida Rock Industries, Inc. v. United States,
18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*,
513 U.S. 1109 (1995) 45, 48

Florida Rock Industries, Inc. v. United States,
45 Fed. Cl. 21 (1999) 41-42

Forbes v. Hubbard, 180 N.E. 767 (Ill. 1932) 31-32

Greenbriar, Ltd. v. City of Alabaster,
881 F.2d 1570 (11th Cir. 1989) 17, 20

Hodel v. Irving, 481 U.S. 704 (1987) 47

Hughes v. Washington, 389 U.S. 290 (1967) 26

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 29

Karam v. New Jersey, Department of Environmental Protection, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999) 32

TABLE OF AUTHORITIES—Continued

Page

Lopes v. City of Peabody,
629 N.E.2d 1312 (Mass. 1994) 35

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 45-46

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) ..... passim

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) ... 13-14, 16-18, 20

Machipongo Land and Coal Company v. Commonwealth of Pennsylvania,
719 A.2d 19 (Penn. App. 1998) 46

Mayhew v. Town of Sunnyvale,
964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) 18-20

Monongahela Navigation Co. v. United States,
148 U.S. 312 (1893) 33

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 22-23

Ohio Forestry Association v. Sierra Club,
523 U.S. 726 (1998) 15, 19

Palm Beach Isles Associates v. United States,
No. 99-5030, 2000 U.S. App. Lexis 27828 (Fed. Cir. 2000) 30

Penn Central Transportation Company v. City of New York, 438 U.S. 104 (1978) ..... passim

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 16, 49

TABLE OF AUTHORITIES—Continued

Page

Phillip Morris, Inc. v. Reilly, 113 F. Supp. 2d 129 (D. Mass. 2000) 30

Preseault v. Interstate Commerce Commission, 494 U.S. 1 (1990) 46

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 47

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 44-45

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 14-16, 19

Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985) 15-16

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) 33, 48-49

Vatalaro v. Department of Environmental Regulation, 601 So. 2d 1223 (Fla. Dist. Ct. App.), *reh'g denied*, 613 So. 2d 3 (Fla. 1992) 32

Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991) 47

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 13-16, 34

Constitutions

U.S. Const. amend. V 1, 26

amend. XIV 1

Statutes

28 U.S.C. § 1257(a) 1

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

1 E. Coke, Institutes of the Laws of England, (1st Am. ed. 1812) 43

Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* (1997) 25-26

Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* (1993) 25

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097 (1981) 28-29

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) .. 28

Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. of Puget Sound L. Rev. 351 (1987) 25

Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (1996) 25

John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994) 46

John Locke, *Two Treatises of Government*, The Second Treatise (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967, amended 1970) 25

Laurence H. Tribe, *American Constitutional Law* (2d ed. 1988) 29-30

TABLE OF AUTHORITIES—Continued

Page

Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345 (1998) 27

The Federalist No. 10 (James Madison) (Bantam ed., 1982) 25

William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553 (1972) 25-26

William S. Walter, *Appraisal Methods and Regulatory Takings: New Directions for Appraisers, Judges, and Economists*, 73 Appraisal J. 331 (1995) 43

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island is reported at 746 A.2d 707 (2000); it appears in the Petitioner's Appendix (PA) starting at A-1. The decision of the Superior Court of Rhode Island (Washington County) is not reported; it appears in PA starting at B-1.

JURISDICTION

Petitioner has been granted review from the opinion and judgment of the Supreme Court of Rhode Island, filed February 25, 2000. This Court granted the Petition for Certiorari on October 10, 2000. *Palazzolo v. Coastal Resources Management Commission*, No. 99-2047. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

For nearly 40 years, Anthony Palazzolo owned, directly or indirectly, a valuable parcel of property in the ocean resort town of Westerly, Rhode Island. He has owned it directly since 1978 and has attempted to develop it since 1961. The government, however, has had other plans. Citing the

ecological value of the property if left in its natural state, and finding that Mr. Palazzolo's development proposals would benefit Mr. Palazzolo rather than fulfilling, among other things, "'a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests,'" the state has refused to allow Mr. Palazzolo to put his property to a reasonable economically beneficial and productive use. Joint Appendix (JA) at 27, Coastal Resources Management Plan (CRMP) Sect. 130(A)(1), reproduced in Decision of Coastal Resources Management Council, February 18, 1986 (CRMC Decision). But when confronted with Mr. Palazzolo's claim for a regulatory taking the Rhode Island courts have refused to grant relief, finding (1) that five permit applications (including two since Mr. Palazzolo directly owned the property) are not enough to ripen his claim, (2) that when Mr. Palazzolo acquired the property in 1978 from the corporation in which he was the sole shareholder he had acquired it upon notice of the regulatory scheme, thus defeating his claim, and (3) the alleged presence of some unrealized potential value for a single home site or an open-space gift removes the claim from the *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), denial of "all use" rule and, therefore, ultimately defeats his regulatory takings claim.

A. The State of Rhode Island Has Refused to Allow Mr. Palazzolo to Develop His Property

Mr. Palazzolo acquired the property from Natale and Elizabeth Urson in 1959 and 1960. During this time the ownership was transferred to Shore Gardens, Inc., and Mr. Palazzolo became the sole owner of Shore Gardens in 1960.[1] Opinion, PA at A-2 He has paid taxes on this property

---

[1] According to the court below, Shore Gardens transferred 11 (out of 80) lots to various grantees between 1959 and 1961. Opinion of

(continued...)

since 1959. JA at 59, Testimony of Anthony Palazzolo. The property consists of roughly 18 acres of wetlands and a small indeterminate amount of uplands. Opinion, PA at A-3 n.1. The land now owned by Mr. Palazzolo was divided into 74 parcels in 2 subdivision map filings that occurred in 1936 and 1959. *See* Opinion, PA at A-2. It is situated just north of Atlantic Avenue which borders the Atlantic Ocean. To the South, Atlantic Avenue is heavily developed with vacation homes. Just north of the property is Winnapaug Pond, an intertidal pond with an outlet to the Atlantic Ocean. "Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings." JA at 21, CRMC Biologist's Field Report. At the time of his application, the vicinity of Mr. Palazzolo's property was developed with vacation homes, mostly on the northern and western and eastern boundaries of the pond and along the ocean beach. *See* contemporaneous aerial photographs found in Joint Lodging No. 2, Defendants' Exhibits N and L, and Joint Lodging No. 1, Tab 6 (showing location of property). To the west of the property there is a public beach operated by the State of Rhode Island with parking spaces for 2800 cars. Trial Testimony of David S. Reis, CRMC Principal Environmental Scientist, June 25, 1997, Trial Transcript at 537-38. *See also* Joint Lodging No. 2, Defendants' Exhibit N and L. There is an airport to the northwest of the pond. *Id.* Mr. Palazzolo's property is bisected by a gravel road and there are several homes in the immediate vicinity; the road and homes were built on fill prior to the 1970's. JA at 71, 74, Trial Testimony of Grover John Fugate, CRMC Executive Director. Like the neighboring homes, the only way to develop Mr. Palazzolo's land is to raise the grade with fill.

---

[1] (...continued)
Rhode Island Supreme Court (Opinion), reproduced in PA at A-2. It then reacquired five of these lots in 1969. *Id.*

During the 1960's the State of Rhode Island did not have any regulatory restrictions upon the filling of wetlands, although it did require permits for dredging from open bodies of water such as Winnapaug Pond. Opinion, PA at A-3-4. In 1965 the Rhode Island legislature gave the Department of Natural Resources the authority to restrict filling of coastal wetlands. Opinion, PA at A-4. This legislation was replaced by the adoption of the Coastal Resources Management Council (CRMC) Enabling Act, P.L. 1971, ch. 279, § 1, codified as G.L. 1956, ch. 23 of title 46, which created the CRMC and gave it authority to regulate coastal wetlands. Opinion, PA at A-4.[2] These regulations imposed a permitting requirement upon the filling of wetlands in Rhode Island. The CRMC regulations further require that any filling of coastal salt marsh, such as that found on Mr. Palazzolo's property, meet certain public interest requirements. For example, Section 130(A) of the CRMP states:

> A. Special exceptions may be granted . . . only if and when the applicant has demonstrated that:
>
> (1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

---

[2] The implementing regulations are published in the State of Rhode Island Coastal Resources Management Program, as Amended June 28, 1983, reproduced at JA 27-28, CRMC Decision.

JA at 37-38, *Palazzolo v. Coastal Resources Management Council*, Case No. 86-1496, Decision by Judge Israel, January 5, 1995 (trial court decision in appeal of administrative decision) (hereinafter Judge Israel Decision). Tellingly, the CRMC has ruled that private housing, and even low-income public housing, does not meet this public interest requirement. JA at 73, Testimony of Grover Fugate; JA at 94, Testimony of David S. Reis.

Prior to the adoption of this regulatory regime, Mr. Palazzolo applied twice to utilize the property, seeking permission to dredge Winnapaug Pond in order to develop the property. (As noted, during this period permission was required to dredge open waters, but not for the filling of wetlands.) Opinion, PA at A-3. The first application, filed with the Department of Harbors and Rivers (DHR) in 1962, was rejected as being incomplete. Opinion, PA at A-3. Shore Gardens filed a second application in 1963, proposing to dredge a portion of the pond in order to provide fill for approximately 18 acres of wetlands. *Id.* When this application encountered difficulties, Shore Gardens filed a third application to fill less of the property for a recreational beach facility. DHR approved both applications in April of 1971, giving Mr. Palazzolo the choice of pursuing either plan. Opinion, PA at A-4. DHR found that *neither* application would " 'have any significant effect on wildlife,' " JA at 36, Judge Israel Decision. On November 17 of that year, DHR withdrew the approval. Opinion, PA at A-4.

Mr. Palazzolo had an interest in the property through the 1960's and early 1970's as the sole shareholder of Shore Gardens. Mr. Palazzolo let the corporation lapse and its charter was revoked in 1978. At this point, the property "pass[ed] by operation of law to Palazzolo, its sole shareholder." Opinion, PA at A-14.

After that time, Mr. Palazzolo, now as the owner of the property in his individual capacity, twice more applied for

permits to CRMC to fill the property. The first application, filed in 1983, like the one filed in 1963, was to fill approximately 18 acres of the property. Opinion, PA at A-5. Unlike the original applications, this involved no dredging. JA at 25, CRMC Decision. Mr. Palazzolo expected that approval of this application would allow him to proceed with the development of homes on the 74 lots that had been previously subdivided, although the 1983 application was only for the preliminary step of filling the wetlands, not the development of homes. *See* Opinion, PA at A-11. CRMC denied this application on July 12, 1984, and Mr. Palazzolo did not appeal the denial. Opinion, PA at A-5. *See also* JA at 13, CRMC Decision on 1983 application.

In 1985 Mr. Palazzolo applied to fill 11.4 acres; like his 1966 application to DHR, he intended to prepare the site to make it suitable for a family beach recreational area. JA at 32-33, Judge Israel Decision. The plan called for the construction of a 50 car parking lot with room for boat trailers, and the provision of picnic tables, concrete barbecue pits, and portable toilets. *Id.* This plan was rejected on February 18, 1986. JA at 25, CRMC Decision. CRMC found that, in its natural state, Mr. Palazzolo's property provided the public benefits of "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds," "access of [f]auna to cover areas," facilitates "the exchange of nutrient/waste products," and allows "sediment trapping," "flood storage," and "nutrient retention." JA at 27.

Furthermore, the proposal failed to meet various regulatory criteria outlined in CRMC's CRMP regulations. For example it found that Mr. Palazzolo's beach club was in "conflict" with CRMP Section 130 (A)(1) (beach club did not serve "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests," CRMP Section 210.3(C)(1) (proposal did not serve "Council's goal . . . to preserve, and where possible, restore coastal

wetlands," CRMP Section 210.3(C)(4) (noting that "[a]lterations to salt marshes . . . are prohibited except for minor disturbances associated with residential docks and walkways . . . and . . . structural shoreline protection facilities," CRMP Section 300.2(B)(1) (fill is prohibited "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms, and CRMP Section 330(A)(1) (noting that the "primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coast region is to retain visual diversity")). JA at 27-28.

B. The Rhode Island Courts Have Refused to Award Damages for the Taking of Mr. Palazzolo's Property

Mr. Palazzolo appealed the CRMC's denial of his 1985 application, alleging that the decision was arbitrary and capricious and that the denial deprived him the use of his property. A Rhode Island Superior Court upheld the denial. It agreed with CRMC that Mr. Palazzolo's beach club plan did not serve a "compelling public interest which provides benefits to the public as a whole as opposed to individual or private interests" because (1) the public was already walking across Mr. Palazzolo's property, (2) his beach club plan would not "provide access to the shore for broad, as opposed to narrow, segments of the public," and (3) that there might be better ways of serving the public's interest than Mr. Palazzolo's beach club proposal. JA at 38-39, Judge Israel Decision. The court also found that the claim that the denial deprived Mr. Palazzolo the use of his property was inappropriate in a case appealing the administrative decision. JA at 40-42, Judge Israel Decision. Mr. Palazzolo did not appeal.

Based on the four denials over the space of 23 years, Mr. Palazzolo concluded that CRMC would never tolerate any improvement of the wetlands on his property. Recognizing that the only uses that would be permitted on the wetlands were

public uses, he filed a complaint for inverse condemnation on June 15, 1988, seeking damages for the regulatory taking of his property. *Palazzolo v. Rhode Island*, Case No. 88-0297, Superior Court Decision, October 24, 1997 (hereinafter Judge Williams Decision), PA at B-3. An amended complaint was filed on October 23, 1995, JA at 43-46 (Amended Complaint).[3] At trial, Mr. Palazzolo alleged that based on its development potential, the property had a net value of $3,150,000. Opinion, PA at A-13. After a seven day trial the Superior Court ruled against Mr. Palazzolo. It found that his proposal would have an adverse effect on the environment,[4] that Mr. Palazzolo had no property right and no investment backed expectations in developing his property because he acquired it (in his individual capacity) after the CRMC regulations were in place, and finding that Mr. Palazzolo should pursue other development plans for the property. Judge Williams Decision, PA at B-9 to B-13.

The Rhode Island Supreme Court upheld the trial court decision. The court's first ground for affirming the trial court decision was that Mr. Palazzolo's claim was not ripe because he failed to apply for "less ambitious development plans." Opinion, PA at A-11. It found that the 1963 and 1983 applications sought to fill the entire 18 acres of wetlands and

---

[3] While the amended complaint described the three applications from the 1960's as well as the 1985 application, it did not specifically mention or describe the 1983 application. JA at 44. Allegations regarding the applications from the 1960's were later dismissed. Order of the Superior Court in No. 88-1097, March 25, 1996. The essence of the takings claim, therefore, is the denial of the 1985 permit application.

[4] This discussion was predicated upon the construction of homes and the resulting nitrates that leach from residential septic systems. PA at B-10 to B-11. The inquiry that is the subject of *this* takings inquiry, of course, is an 11.4 acre fill for a beach club that would require no septic systems. JA at 33, Judge Israel Decision.

(mistakenly) that the beach club applications sought to "fill all of the wetlands except for a fifty-foot strip."[5] *Id.* The court concluded that Mr. Palazzolo should have filed another application to fill fewer wetlands acres or to utilize just the upland area of the property. *Id.*

The court also provided two other alternative bases for affirming the trial court decision.[6] It held because Mr. Palazzolo acquired the property in 1978 by virtue of the dissolution of Shore Gardens, Opinion, PA at A-14-15, he had acquired the property *after* the adoption of the regulations restricting the filling of wetlands and thus "had no reasonable investment-backed expectations." Opinion, PA at A-17. Put

---

[5] In stating that Mr. Palazzolo's 1985 application "sought permission to fill all of the wetlands except for a fifty-foot strip between the fill and the pond," Opinion, PA at A-11, the Rhode Island Supreme Court simply erred. That statement is unsupported by any citation to the record and is contradicted not only by Judge Israel's opinion cited in the text but also by numerous statements of state employees. *See* JA at 21 (CRMC "Biologist's Field Report" referring to the "approx. 12± acres of fill"); JA at 23 (CRMC "Engineer's Field Report" describing the proposed fill as encompassing "11.4 ac±"); Plaintiff's Trial Exhibit 12 at 1 (Division of Fish and Wildlife "Inter-Office Memo" describing the area proposed to be filled as "between 10-15 acres").

[6] The court stated that "[a]lthough our determination that the claim was not ripe is dispositive of the case, we shall briefly discuss the merits of Palazzolo's claim." Opinion, PA at A-12. In addition to ruling on the issue of ripeness, it is critical that this Court reach the other grounds of the lower court's decision; otherwise the judgment below will forever preclude Mr. Palazzolo from proceeding with his regulatory takings claim. *See, e.g., DiBattista v. Rhode Island*, 717 A.2d 640, 642 (R.I. 1998) ("The doctrine of res judicata renders a prior judgement by a court of competent jurisdiction in a civil action between the same parties conclusive as to any issues actually litigated in the prior action.").

another way, "the right to fill wetlands was not part of the title he acquired." Opinion, PA at A-15.

The court also found that Mr. Palazzolo "had not been deprived of all beneficial use of his property" because had he developed the upland portion of the land he could have realized some value from the property (approximately $200,000 compared to Palazzolo's estimate of a $3.1 million net value). Opinion, PA at A-12-13. Alternatively, he could have realized "value in the amount of $157,000 as an open-space gift." Opinion, PA at A-13.

This Court granted certiorari on October 10, 2000.

SUMMARY OF ARGUMENT

There is no question that the State of Rhode Island will not permit Mr. Palazzolo to place any fill upon the wetlands on his property. No further administrative process will alter this decision. Because Mr. Palazzolo alleges that he can realize no economically viable use of his property unless he can develop some of the wetlands, his claim for a regulatory taking is ripe. Furthermore, the fact that Mr. Palazzolo acquired the property after the adoption of the regulatory permitting requirement does not mean that he lacks the right to ripen and pursue a claim for a regulatory taking. Finally, just because the State of Rhode Island suggests that it will allow him to develop a single homesite on his property does not mean that an economically viable use remains in the property.

ARGUMENT

I

MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE

The Rhode Island Supreme Court held that Mr. Palazzolo's "claim for [just] compensation was not ripe for review." Opinion, PA at A-11. In so holding, the court failed

to understand that Mr. Palazzolo has satisfied all of this Court's ripeness requirements for regulatory takings claims.

A. Because the Type and Intensity of Development Legally Permitted on Mr. Palazzolo's Property Is Perfectly Clear, This Takings Case Is Ripe for Review

Mr. Palazzolo's 1983 application for a special exception (a form of variance) to CRMC "sought permission to fill the entire eighteen acres of wetlands" owned by him. Opinion, PA at A–11. His most recent application in 1985 was less ambitious: he sought permission "to fill approximately 11.4 acres" in order "to create a private beach club . . . for swimming picnicking, shellfishing and boating without the erection of any structures on the property." JA at 32-33, Judge Israel Decision. CRMC denied Mr. Palazzolo's application. CRMC found that the "proposed project is in conflict with," among other provisions, the following three provisions of the CRMP:

> Section 210.3(C)(1): "The Council's goal is to ***preserve***, and where possible, restore ***coastal wetlands***."
>
> Section 300.2(B)(1): ". . . unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms ***filling . . . is prohibited on . . . coastal wetlands*** . . . adjacent to Type 1 and 2 waters."
>
> Section 300.2(B)(2): "***Filling . . . on coastal wetlands is prohibited*** adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

JA at 27-28, CRMC Decision (emphasis added, omissions in original).

In brief, then, Mr. Palazzolo's application was denied because it sought to fill wetlands for purposes other than

conservation, mosquito control, and shoreline protection, and because the filling of wetlands for other than such purposes is simply prohibited. After all, CRMC's overriding goal is to "preserve, and where possible, restore" wetlands. JA at 28, CRMC Decision. Indeed, in denying Mr. Palazzolo's 1985 application to fill coastal wetlands in order to create a private beach club, CRMC was merely executing its statutory "mandate[] to give environmental concerns primacy over all other considerations." JA at 39, Judge Israel Decision; *accord id.* ("[P]reservation and restoration of ecological systems shall be the *primary* guiding principle upon which environmental alteration of coastal resources will be measured, judged, and regulated." (quoting R.I. Gen. Laws § 46-23-1(a))).

As should be apparent from the unconditional character of these statutory and regulatory mandates, the prohibition against filling coastal wetlands—or even making "alterations" to them—is not dependent on the magnitude of area proposed to be altered. Whether that area is 18.0 acres, 11.4 acres, or 0.1 acres, altering wetlands is flatly prohibited "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms." JA at 28. Indeed, Judge Israel relied on testimony that "[t]he only use for the land which would completely reduce environmental impact . . . would be to leave it in its present state." JA at 34, Judge Israel Decision. In order to pursue all possibilities, Mr. Palazzolo inquired what sort of wetland-altering proposal *would* be granted. Mr. Palazzolo testified without contradiction that "CRMC informed him that ***any proposal*** involving the filling of wetlands would be denied." PA at B-5, Judge Williams Decision (emphasis added).

On the other hand, "Grover Fugate, the Director of CRMC, and Steven Clarke, a professional engineer, testified that CRMC would have approved the eastern end of Shore Gardens Road as a home site." *Id.*; *accord* Memorandum in Opposition to Petition for Writ of Certiorari at 4 ("A portion of

the site, a piece of upland, would have been approved by the CRMC as a single home site."); Opinion, PA at A–11 (observing that Mr. Palazzolo could "build at least one single-family home on the existing upland area"). Thus, the uncontradicted evidence was that CRMC *would* continue to deny Mr. Palazzolo permission to alter any of the 18 acres of wetlands, thereby precluding any development of that portion, but *would not* deny him permission to build one single-family home on the small upland portion of his property.

These facts satisfy the Court's ripeness requirements for regulatory takings claims, for "the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 191 (1985). CRMC, the relevant administrative agency here, has arrived at a final, definitive position regarding how it will apply the CRMP to Mr. Palazzolo's coastal property. That position is simply stated: The Plan bars Mr. Palazzolo from altering ***any*** wetlands but does not bar him from building one single-family home on uplands. Thus, we know just how Mr. Palazzolo "will be allowed to develop [his] property." *Id.* at 190. CRMC says it will allow him to develop a single house, but not to develop a private beach club—or any other use of his property that involves alterations to wetlands.

"[T]he type and intensity of development legally permitted" on Mr. Palazzolo's 18-plus acres of land is perfectly clear: one single-family home and nothing more. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986). In these circumstances, Mr. Palazzolo has surely satisfied this Court's "insistence on knowing the nature and extent of permitted development" before it will adjudicate a regulatory takings claim. *Id.* at 351. The "nature" of permitted development is single-family residential, the "extent" is one home confined to the upland portion of Mr. Palazzolo's

property. Accordingly, "[t]he demand for finality is satisfied by [Mr. Palazzolo's] claim . . . there being no question here about how the 'regulations at issue [apply] to the particular land in question.'" *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 739 (1997) (quoting *Williamson County*, 473 U.S. at 191).

B. None of the Reasons Adduced by the Lower Court Detracts from the Conclusion That the Case Is Ripe

Notwithstanding this analysis, the Rhode Island Supreme Court ruled that Mr. Palazzolo's takings claim was not ripe because he did not seek "permission for less ambitious development plans," specifically permission for uses of the property that "would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." Opinion, PA at A-11. More generally, the lower court reached what it called the "self-evident conclusion that a landowner who is denied regulatory approval to use his or her property in a particular way must file additional applications seeking permission for less ambitious uses before a takings claim may be sustained." Opinion, PA at A-12 n.6; *accord* Opinion, PA at A-11 (chiding Mr. Palazzolo because he had not "explored development options less grandiose"). The court did not cite any authority for this conclusion, but it apparently drew inspiration from the statement in *MacDonald* that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9, *cited in* Opinion, PA at A-10.

This use of *MacDonald*—to impose a per se requirement that landowners denied permission to use their property in a particular way must *always* file "additional applications" seeking permission for "less ambitious" uses in order to ripen their takings claims, Opinion, PA at A-12 n.6—cannot be squared with this Court's ripeness jurisprudence. As explained

below, when the ripeness doctrine is applied with an eye toward its legitimate end—namely, ensuring a takings claim's "fitness for review"—it is apparent that there is no per se "additional applications" requirement in regulatory takings procedure.[7]

1. The "Point" of the Ripeness Doctrine in Takings Cases

Although governmental defendants too often view the ripeness doctrine merely as an artful device to stave off troublesome takings claims, it does have a nobler purpose. The doctrine's "basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967)). A disagreement is abstract (and adjudication therefore premature) when "further factual development would 'significantly advance our ability to deal with the legal issues presented' and would 'aid us in their resolution.'" *Ohio Forestry Association v. Sierra Club*, 523 U.S. 726, 737 (1998) (quoting *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 82 (1978)). By contrast, when the issue "will not be clarified by further factual development" outside

---

[7] In addition to the fact that Mr. Palazzolo did not seek permission for "less ambitious" plans, the Court below based its ripeness holding on one other "fact," namely, that "although Palazzolo claimed that his property was taken when he was *denied permission to develop a seventy-four-lot subdivision*, he never applied for permission to develop such a subdivision." Opinion, PA at A–11 (emphasis added). The court concluded that because Mr. Palazzolo "has not applied for permission to develop a seventy-four-lot subdivision, he has not received a 'final decision regarding the application of the regulations to the property at issue.'" Opinion, PA at A–11 (quoting *Williamson County*, 473 U.S. at 186). This conclusion does not follow. The denial that precipitated this case was for a beach club; the denial is based on the fact that no use is allowed on any of the wetlands.

the courtroom, *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 581 (1985), then the issue "is fit for judicial resolution," and adjudication is not premature, *Suitum*, 520 U.S. at 743 (quoting *Abbott Laboratories*, 387 U.S. at 153).

How do these principles apply in takings cases? In *MacDonald*, the Court reiterated that to establish a regulatory taking, a property owner must show that "the regulation 'goes too far.'" 477 U.S. at 348 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). As *MacDonald* explained, however, "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* In other words, where "the inquiry asks if a regulation has 'gone too far,' . . . no answer is possible until a court knows *what use, if any, may be made of the affected property*." *Id.* at 350 (emphasis added). It is only with this knowledge that the court is able to measure "the effect the [application of the] regulations had on the value of [the landowner's] property and investment-backed profit expectation," two factors that contribute "in significant part" to resolving the ultimate question of takings liability. *Id.* at 349 (quoting *Williamson County*, 473 U.S. at 200). To return to general principles, once the court knows what uses may or may not be made of the property, the takings issue "will not be clarified by further factual development" outside the courtroom. *Thomas*, 473 U.S. at 581.

2. The Pointlessness of an "Additional Applications" Requirement in Many Cases

The Rhode Island court's "additional applications" requirement is inconsistent with these principles. In some cases, no doubt, an additional application will be necessary to provide the court with the information it needs to determine whether the regulation has effected a taking. In *MacDonald* itself, for example, the property owner had "submitted one subdivision proposal and ha[d] received the [agency's] response thereto." 477 U.S. at 351. This Court, however, accepted the lower court's assertion that "the refusal of the [agency] to

permit the intensive development desired by the landowner"—159 residential units—"does not preclude less intensive, but still valuable development." *Id.* at 352 n.8. In other words, because there was "the possibility that some development will be permitted," *id.* at 352, this Court simply did not know on the existing record what uses could be made of the property, making it impossible to determine whether the property had been taken, *see id.* at 352-53. An additional application by the property owner was therefore necessary to establish whether the "less intensive, but still valuable development" that was available in theory was also available in fact.

In many other cases, however, additional applications will be pointless and therefore not required. *Cf. id.* at 352 n.8 (strongly rejecting the notion that a court would require a property owner "to file further 'useless' applications to state a taking claim"). This is so for two reasons.

First, it may be pointless in a particular case because the agency's response to any additional application is already known with reasonable certainty. As the Eleventh Circuit put it, where "there is no uncertainty regarding the level of development that would be permitted," a "reapplication requirement serves no purpose." *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989).

This analysis helps to clarify *MacDonald's* statement that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9. Although that statement is doubtless true, it is also true that rejection of "exceedingly grandiose development plans" does not logically imply that "less ambitious plans" will be accepted. The common thread here is that rejection of one plan does not *logically* (i.e., necessarily) imply anything about what treatment the second plan will receive, regardless of its relative size or

scale. The implications to be drawn from rejection of the first plan depend entirely on the particular facts of the case. Given the agency's concerns with things such as the "level of [police] protection capable of being afforded to the proposed site," *id.* at 343, it may have been reasonable to infer in *MacDonald* that the agency would be amenable to a 100-unit subdivision notwithstanding its rejection of a 159-unit subdivision.

Second, it may be pointless in a particular case to file an additional application because the agency's response to any such application would be legally irrelevant. As described above, this Court in *MacDonald* concluded that despite the agency's denial of a particular plan for development of 159 residential units, there was "the possibility that some development will be permitted." 477 U.S. at 352. But in identifying the existence of this possibility, the Court was careful also to identify its legal relevance, pointing out that the property owner "does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." *Id.* at 352 n.8. As the Texas Supreme Court has observed, *MacDonald* thus implied that the takings claim would not have been dismissed for lack of ripeness "if the applicant's complaint had been that the only way to avert a regulatory taking was for the county to approve the subdivision proposal." *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 932 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999). Accordingly, "[t]he ripeness doctrine does not require a property owner . . . to seek permits for development that the property owner does not deem economically viable." *Id.*

This conclusion accords with the above-described purposes of the ripeness doctrine. Consider a scenario in which the property owner in *MacDonald* had indeed alleged that "only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking." In so alleging, the owner would essentially be conceding that the agency might approve a less intensive plan but arguing that no such plan would leave

him with economically viable use of his property or satisfy his reasonable investment-backed profit expectations. As should be apparent, it simply *does not matter* to the resolution of this legal issue precisely what size plan the agency would approve—or even whether the agency would in fact approve a less intensive plan at all. In other words, knowing whether the agency would approve a subdivision plan for 100 homes (or 50 or 10 or 5) would assuredly not "significantly advance [a court's] ability to deal with the legal issues presented." *Ohio Forestry Association*, 523 U.S. at 737.

Of course, it might turn out that the property owner's allegations regarding economic viability and profit expectations are simply wrong: the agency might show, for example, that a 100-home plan would be both economically viable and consistent with the owner's profit expectations. This showing, however, would turn on evidence obtained from appraisers and economists and the like, not on evidence about what the agency would or would not have done in response to "additional applications." If the agency were to make the hypothesized showing, the takings claim should be dismissed. But crucially, this dismissal would be *on the merits*, not for lack ripeness. Accordingly, the *ripeness* of a takings claim should not turn on the accuracy of the property owner's allegations about economic viability or profit expectation. After all, the ripeness analysis concerns "fitness for review," *Suitum*, 520 U.S. at 742; it should not be the review itself.[8]

---

[8] The *Mayhew* case adhered to the paradigm described in the text. Although the Texas Supreme Court found the case to be ripe without the filing of additional applications for less ambitious uses because 3,600 homes was "the minimum number of units the Mayhews believed [i.e., alleged] necessary to make an economically viable use of their land," 964 S.W.2d at 931, the court also found, *on the merits*, that the city's failure to approve the 3,600-unit planned development did not deprive the property of economically viable use, *see id.* at

(continued...)

Here, the Rhode Island Supreme Court criticized Mr. Palazzolo for not having "sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." Putting aside the fact that Mr. Palazzolo's 1985 application sought to fill just 11.4 acres where his 1983 application had sought to fill 18.0 acres, *see supra*, at 9 and notes 5, 6, any additional applications would have been pointless. As explained above, it is undisputed on the record that "***any*** proposal involving the filling of wetlands would be denied" by CRMC. PA at B-5, Judge Williams Decision (emphasis added). As for seeking permission to develop only the upland portion of the parcel, CRMC asserts that it *would not* have denied permission to build one single-family home. Simply put, the Rhode Island Supreme Court surely did know "what use, if any, may be made of the affected property." *MacDonald*, 477 U.S. at 350.

II

THE EXPECTATIONS AND RIGHTS TO MAKE ECONOMICALLY VIABLE USE OF PROPERTY DO NOT DISAPPEAR MERELY BECAUSE TITLE HAS PASSED TO A NEW OWNER

The rights that inhere in the ownership of property are undeniably affected by regulation. But do those rights disappear, or become putatively owned by the government, merely because the ownership of regulated land is transferred

---

[8] (...continued)
937. Similarly, although the Eleventh Circuit in *Greenbriar* found the property owner's claim to be ripe without the filing of additional applications for less ambitious uses because "there is no uncertainty regarding the level of development to be permitted," 881 F.2d at 1576, the court also found, *on the merits*, that the Constitution did not actually require the city to permit this level of development, *see id.* at 1577-80.

between owners? If not, who has the right to sue when the application of the regulation allegedly effects a taking? The new owner who acquired the property who actually or constructively knew of the regulatory scheme? Or the original owner, who, as in this case, may no longer exist and who certainly is not generally considered to have any remaining interest in the property?

The answer to these questions should not be difficult. Assuming that the Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), the prospect that any landowner (either the original or the new owner) can suffer a wipeout of use and value of the property without the prospect of the government paying compensation to *someone* should be unsettling. When that wipeout rises to the level of taking, compensation must be due. And, as will be shown, it must be due to the individual or entity with a remaining interest in the property who, by filing an application for a discretionary land use permit, set in motion the government action that took the property.

The court below found that Mr. Palazzolo could not assert a claim for an as applied regulatory taking because he acquired the property in 1978, well after the date of the adoption of the CRMP regulations. Because he was on "notice" of the regulations the court found his claim fails because (1) he had no investment backed expectations in trying to develop the property, Opinion, PA at A-17, and because (2) the right to fill was not part of the title that he acquired from Shore Gardens. Opinion, PA at A-15. Put bluntly, "all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." Opinion, PA at A-16. The reliance of what can be called a "notice rule" theory of property, based upon either the restricted title theory or an investment backed expectations rationale, is inconsistent

with holdings of this Court and belies a misunderstanding of the nature of property.

A. This Court Has Previously Rejected the Notion That Notice of a Preexisting Regulation Allows Government to Take Property Without Compensation

This Court has previously considered and rejected the notion that the purchase of property upon "notice" of a pre-existing regulation somehow gives the state carte blanche to effect an uncompensated taking in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). In that case the California Coastal Commission was established by the California Coastal Act of 1972. Pursuant to the Act, "stringent regulation of development along the California coast had been in place at least since 1976," and in particular, a deed restriction granting the public an easement for lateral beach access "had been imposed since 1979 on all 43 shoreline new development projects in [the vicinity of the Nollan property.]" *Id.* at 859 (Brennan, J., dissenting). The Nollans purchased their property after this time and became subject to the Commission's forced dedication requirement. This Court found that the restriction violated the Takings Clause because it did not "substantially advance[] legitimate state interests." *Id.* at 834.

But, in dissent, Justice Brennan challenged this Court's holding on, among other grounds, the fact that the Nollans were "on notice that new developments would be approved only if provisions were made for lateral beach access." *Id.* at 860. With such notice, the Nollans "could have no reasonable expectation of . . . approval of their permit application without any deed restriction ensuring public access to the ocean." *Id.* This Court disagreed, stating:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Id. at 833 n.2. Just as the Nollans were able to proceed with a takings claim arising out of the application of regulations and policies in place at the time they purchased their property, so should Mr. Palazzolo be able to pursue his takings claim that arises out of the application of regulations that were applied after he acquired the land from Shore Gardens.

B. If the Promise of the Takings Clause Is to Retain Meaning, Then a State Cannot Acquire Substantial Interests in Real Property Without Cost

The *Nollan* understanding of the effect of preexisting regulations on subsequent owners is necessary in order to avoid the disappearance of valuable interests in property. As shown by the many developed properties surrounding Winnapaug Pond, it is plain that there at one time existed the reasonable expectation and right to fill privately owned wetlands and place homes upon that fill. Certainly that right existed in 1959 when Shore Gardens acquired the property and it is plain from the pattern of neighboring development that Shore Gardens had every expectation and right to develop its property. Furthermore, Shore Gardens could have easily severed its development rights on the property and transferred them, for valuable consideration, to a third party, retaining a fee interest in the underlying land. (In fact, that is exactly what the state seems to be admitting when it valued the property at $157,000 for an open-space gift.) But since 1986, it has been obvious to Mr. Palazzolo that it is impossible to exercise those development rights: fill, homes, and beach clubs can no longer be placed on the wetlands surrounding Winnapaug Pond. Exactly what has become of those development rights today?

Shore Gardens is no more. It ceased to exist in 1978 and lacks the legal identity required to assert any takings claim and has not been able to ripen a takings claim since 1978. Clearly, Shore Gardens has no expectations and does not hold the development rights. However, if the opinion of the court below were to be left undisturbed, neither does Mr. Palazzolo. That he was on notice of the regulatory regime defeats his very interest in the property made subject to the regulation. Mr. Palazzolo no longer holds the development rights. Therefore, the inescapable conclusion must be that Rhode Island is now the de facto possessor of the development rights, for which it has paid nothing. If the promise of the Takings Clause is to retain meaning, then the doctrinal anomaly that permits the state to acquire a substantial interest in real property without cost must be questioned. Indeed, such a doctrine is totally inconsistent with the nature and purpose of the Takings Clause.

1. The History and Structure of the Constitution Are Antithetical to a Theory That Government Can Acquire the Right to Use and Develop Property Without Paying Just Compensation

If Rhode Island has been able to acquire the rights to use and develop Mr. Palazzolo's property merely because he acquired his land after regulations had been adopted, that would make the nature of property rights in Rhode Island very ephemeral indeed. It would also be contrary to the notion that property is an individual *right* rather than a benefit bestowed by government. The drafters of the Constitution were profoundly influenced by John Locke who wrote that property, in the fullest understanding of the meaning of that word, is a right inherently possessed by individuals and that individuals only give up certain rights to government in order to better protect their property:

> [Man] seeks out, and is willing to joyn in Society with others who are already united, or have a mind to unite for the mutual *Preservation* of their Lives, Liberties and Estates, which I call by the general Name, *Property*.

John Locke, *Two Treatises of Government*, The Second Treatise § 123 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967, amended 1970) (emphasis, spelling, and punctuation in original). As many legal scholars have noted, Locke's idea that government is instituted to protect property, rather than the government being the source of property, deeply influenced the Framers, especially James Madison, as they drafted the Constitution. *See, e.g.*, Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 14-19 (1997) (discusses Locke's influence); Dennis J. Coyle, *Property Rights and the Constitution: Shaping Society Through Land Use Regulation* 228-30 (1993) (same); Harry V. Jaffa, *What Were the "Original Intentions" of the Framers of the Constitution of the United States?*, 10 U. Puget Sound L. Rev. 351, 378-80 (1987) (same); *see also* Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 41, 314-15 (1996) (discusses Madison's growing concern over usurpation of property by local governments); William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Wash. L. Rev. 553, 554-55, 578-79 (1972) (discusses precursors to adoption of Lockean view in federal Constitution).

The structure of the originally ratified Constitution was designed to protect property from, among other things, popular agitation for "an abolition of debts, for an equal division of property, or for any other improper or wicked project." The Federalist No. 10, at 49 (James Madison) (Bantam ed., 1982). Later, the Fifth Amendment added an even more explicit protection of private property.

The difficulty posed by the decision below is that all the words about the role of government to protect property would be hollow formalisms if government truly possessed those development rights on Mr. Palazzolo's property which the government has neither purchased nor condemned. The Framers' conception of property would be equally meaningless if the government could acquire those critical rights upon the mere adoption of a regulation followed by a change of ownership of the title.

Such a method for government acquisition of property is inconsistent with the Framers' vision of the relationship between individuals and their government. The Framers contemplated only one way by which government could acquire private property against the will of the owner—through the use of the condemnation power. *See* Stoebuck, *supra*, at 576-77; Siegan, *supra*, at 27.

2. A State Cannot Acquire Private Property by the Simple Expedient of Redefining the Title

The first explanation of the court below for applying the notice rule to Mr. Palazzolo was that the title he acquired was subject to the "pre-existing limitations" of the regulations. Opinion, PA at A-16. It held that "the right to fill wetlands was not part of the title he acquired." Opinion, PA at A-15. In other words the title acquired by Mr. Palazzolo was very different from the title held by the previous owner Shore Gardens.

But, as this Court has previously noted, a state cannot acquire property without paying for it by the simple expedient of redefining the title. In *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967), Justice Stewart, concurring, noted that "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." A retroactive assertion that property did not exist in the first place is no different from the court

below holding that the development rights in Palazzolo's property vanished (or were divested to the state government) upon the mere acquisition of the property by Mr. Palazzolo.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. at 1014, this Court again returned to the idea that "the government's power to redefine the range of interests included in the ownership of property was necessarily constrained by constitutional limits." This Court held that the proper focus must be upon the "background principles" of property: "Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas*, 505 U.S. at 1029. This implies the existence of stable property interest principles that do not mysteriously change to match every newly adopted regulation every time newly regulated property changes hands.[9]

3. The Acquisition of Property Carries with It the Reasonable Expectation That the Property May Be Put to Economically Viable Use

A second rationale given by the Rhode Island court for its "notice rule" holding was that Mr. Palazzolo lacked "reasonable investment-backed expectations." Opinion, PA at A-17. There

---

[9] Professor Eagle suggests that the "notice rule" is in essence a de facto alteration of a critical element to the title to real property from fee simple title into a personal right. *See* Steven J. Eagle, *The 1997 Regulatory Takings Quartet: Retreating from the "Rule of Law,"* 42 N.Y.L. Sch. L. Rev. 345 (1998). With the notice rule, Professor Eagle concludes, a court

> converts an important component of the fee simple—the right to use one's land—into a personal right that has to be exercised during life or else vanishes.

Id. at 368.

is no natural contradiction between a doctrine that incorporates investment-backed expectations and a legal system that recognizes that the acquirers of regulated property themselves have reasonable investment-backed expectations in being able to ripen an as applied regulatory takings claim. If the ability to own and use property is a fundamental right, then property must be more than a mere expectation that can be altered with the combination of the passage of new regulations and the transfer of property. In a nutshell, the court below misunderstood the relationship between expectations and the meaning of what property *is*. The court implicitly defined the extent of property rights by expectations; because expectations can be readily changed, so can property. But property is not such an evanescent concept.

The concept of "investment-backed expectations" was first articulated by this Court in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 124 (1978), where it was noted that an analysis of distinct investment backed expectations is *one* factor that a court may look to in determining whether there has been a regulatory taking. This Court, at 438 U.S. at 128, credited the derivation of this test to Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1229-34 (1967). But Professor Michelman cautions that expectations are not the exclusive way of defining property for he later said that there

> seems to be little historical or philosophical basis for a conclusion that constitutional property rights are exclusively reliance-based or expectation-based, that they are purely derivative and in no way direct, and that what counts as constitutionally protected property can at any moment be fully told by deciding what entitlements can from time to time be inferred from official standing law.

Frank I. Michelman, *Property as a Constitutional Right*, 38 Wash. & Lee L. Rev. 1097, 1103 (1981). Michelman finds unsatisfactory the result of a pure expectations theory that, when combined with a denial of compensation to riparian owners, would force those riparian owners to discount the value of their property. *Id.* at 1106. Instead, Michelman posits there "must be some kind of direct right of property under the Constitution" and cites *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), as a paradigmatic example where the rights of riparian owners were protected *despite* expectations. *Id.*

Similarly, Professor Tribe has written that "expectations" are not a mere product of state action:

> To the degree that private property is to be respected in the face of republican and positivist visions, it becomes necessary to resist even an explicit government proclamation that all property acquired in the jurisdiction is held subject to government's limitless power to do with it what government wishes. Indeed, government must be denied the power to give binding force to so sweeping an announcement, whether explicit or implicit, if we are to give content to the just compensation clause as a real constraint on federal power and, through the fourteenth amendment, on state and local power. But this shows that the expectations protected by the clause must have their source outside positive law. Grounded in custom or necessity, these expectations achieve protected status not because the state has deigned to accord them protection, but because constitutional norms entitle them to protection.

Laurence H. Tribe, *American Constitutional Law* 608 (2d ed. 1988).[10] Thus, while expectations may be one of several factors that a court may consider in determining whether there has been a compensable taking, nothing this Court has said, and nothing in a legitimate theory of property, supports the notion that mere "notice" of a regulatory scheme can defeat a legitimate claim for a regulatory taking.

It must also be recognized that the theory of the lower court that Mr. Palazzolo's notice of the regulation means that "the right to fill wetlands was not part of the title he acquired," Opinion, PA at A-15, is inconsistent with this Court's categorical takings jurisprudence. In *Lucas* this Court noted that

> when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.

505 U.S. at 1019. This form of a taking occurs without regard of the expectations of the owner. As the Federal Circuit recently found, "when there is . . . a regulatory taking that constitutes a total wipeout, investment backed expectations play no role." *Palm Beach Isles Associates v. United States*, No. 99-5030, 2000 U.S. App. Lexis 27828 at *23 (Fed. Cir. 2000).

---

[10] This reasoning was followed in *Phillip Morris, Inc. v. Reilly*, 113 F. Supp. 2d 129, 145 (D. Mass. 2000). In that case the court rejected the notion that the State of Massachusetts could take plaintiffs' trade secrets because those trade secrets were the product of the state. Citing Tribe, the court rejected that syllogism:

> This argument rests on the positivist notion that since, in a broad sense, all property rights emanate from the State, the State is free to take them away whenever it determines to do so. That proposition must be rejected.

C. Other Courts Have Followed the Logic of *Nollan* and Have Rejected the Notice Rule

Other courts have rejected the notice rule. It has been articulated by the lower courts in two contexts: first, when new owners challenge the application of the regulations and, second, when new owners seek just compensation for the application of the regulations.

That a subsequent owner can challenge a preexisting land-use regulation, even one of long standing, was the holding of the Massachusetts Supreme Court in *Barney & Carey Co. v. Town of Milton*, 87 N.E.2d 9 (Mass. 1949). There the court held that the mere passage of time does not validate an otherwise unlawful regulation:

> The existence of a zoning by-law, which purports to apply to one's land but which in fact cannot be lawfully applied, constitutes a direct invasion of the rights of the owner, and it has been said that mere acquiescence on the part of the owner for whatever period of time does not legalize a usurpation of power which violates rights protected by constitutional provisions.

87 N.E.2d at 14. Likewise, the Minnesota Supreme Court held:

> There is no logical reason why one who purchases with notice of such an ordinance but has sufficient vision and initiative to believe that the property is illegally zoned should not have the same standing he would have enjoyed had he been the owner at the time the ordinance was adopted.

Filister v. City of Minneapolis, 133 N.W.2d 500, 504 (Minn. 1964), *cert. denied*, 382 U.S. 14 (1965). Similarly, the Illinois Supreme Court wrote:

> Counsel for appellants argue that as appellee purchased this property after the passage of the

> zoning ordinance he should not now be heard to complain that that ordinance is invalid. We know of no rule of law that creates an estoppel against attack by such purchaser on the validity of a zoning ordinance unless there be in his acts or the acts of his grantor that which of themselves would estop him.

Forbes v. Hubbard, 180 N.E. 767, 771 (Ill. 1932). *See also Cottonwood Farms v. Board of County Commissioners of the County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988) ("majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations does not preclude a property owner from challenging the validity of the regulations").

Just as courts have long held that new owners of regulated property can challenge the application of the regulations, other courts have found that subsequent owners can seek just compenation. *See, e.g., Karam v. New Jersey, Department of Environmental Protection*, 705 A.2d 1221 (N.J. Super. 1998), *aff'd by adopting appellate opinion*, 723 A.2d 943 (N.J. 1999) (new owner steps into the shoes of the original owner); *Carson Harbor Village, Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994) (an as applied takings challenge can be brought by a purchaser of regulated property); *Vatalaro v. Department of Environmental Regulation*, 601 So. 2d 1223, 1229 (Fla. Dist. Ct. App.), *reh'g denied*, 613 So. 2d 3 (Fla. 1992) (even though plaintiff acquired property after a regulatory scheme was adopted, she could still pursue an as applied takings claim because take did not occur until permits denied); *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996), *aff'd*, 526 U.S. 687 (1999) (a landowner's takings claim proceeded despite the fact that land was purchased with knowledge of permitting requirements).

D. If the Government Is Not to Obtain an Unjust Windfall at the Expense of Property Owners, a Subsequent Owner of Regulated Property Must Be Able to Pursue a Regulatory Takings Claim

Finally, there are pragmatic reasons for eschewing the notice rule: to avoid government windfalls created by placing unjust burdens on property owners. By regulating the development rights on Mr. Palazzolo's wetlands into total inutility, and by preventing Mr. Palazzolo from even seeking inverse condemnation damages because he acquired the land after the regulatory scheme was adopted, the state has achieved the practical effect of acquiring the development rights at no cost. This windfall to the government is contrary the principle underlying the Just Compensation Clause that the owner will be fairly and fully compensated when government takes private property. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893) (compensation must be "full and perfect equivalent for the property taken").

The rule that forbids a subsequent owner from pursuing a regulatory takings claim based upon the application of a preexisting rule imposes unjust burdens on property owners. As noted in Section I, this Court has made it quite plain that a landowner is barred from bringing an as applied takings claim until the claim is fully ripe. The mere adoption of a discretionary permit requirement does not, by itself, constitute a taking. *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985). Landowners, instead, must pursue the application process to its logical end. *See id.* The time and resources necessary to ripen a regulatory takings claim can be considerable and beyond the reach of many landowners of ordinary means. For that reason, a rule that would force landowners to file development applications and, if necessary, sue for a regulatory takings, *prior* to selling the property, would effectively deny just compensation to many individuals. In fact,

if the notice rule were to prevail, claims like Mr. Palazzolo's would expire before they ever became ripe.

Moreover, such a rule imposes particularly unjust burdens in the common circumstance where land is transferred through means other than a sale—such as through foreclosure (as was the case in *Williamson County*), devise, or, as here, the dissolution of a corporation. In those situations, the person or entity owning the property at the time a regulation is adopted may never have an opportunity to ripen a takings claim before the land is transferred to a third party.

It might be suggested that the notice rule is not unfair when both parties know of the difficulties that the regulations might impose and the buyer obtains the property at a "discount" from the seller. If the buyer were allowed to prevail on a regulatory takings claim based on the existing regulation, the theory goes, the purchaser would obtain a "windfall." Or, as the court below put it, this "could lead to pernicious 'takings claims.' " Opinion, PA at A-16. But there is no "windfall" when buyers and sellers fairly assess the risk of a regulatory taking and decide to allocate that risk in the price. Put another way, if the parties know that the subsequent owner can pursue a regulatory takings claim, the buyer will pay more. But if the "notice rule" were adhered to, then the taking of the development rights would be forever uncompensated. The government would be the entity obtaining a windfall.

Why the government should obtain a windfall just because the property's original owner did or could not bring a ripened takings claim has never been explained. Why should it matter that the purchaser has acquired property at a certain discount? The new owner buys at a discount because a buyer assumes certain expenses, risks, and transaction costs in pursuing the permit process and potential takings claim. The Takings Clause is not concerned with the allocation of risk between the original owner and the subsequent purchaser, but with whether the

government will have to pay any compensation to anyone whose property it has taken. As the Minnesota Supreme Court put it in responding to the assertion that a purchaser of regulated property might obtain a windfall:

> Nor do we believe the amount of the consideration is entitled to any weight. There should not be one rule for a purchaser who drives a hard bargain and a different rule for one who pays a more substantial price.

Filister v. City of Minneapolis, 133 N.W.3d at 504.

If new owners cannot seek just compensation when pre-existing regulations are applied, then the original owners will be unable to sell their property, except at a great discount. The only alternative for existing owners of newly regulated property, in order to recoup some of their value, would be to rush to development. Permits in one hand, bulldozers in the other, landowners would have to attempt to develop property whenever potentially confiscatory regulations are adopted. They would have to do this before they sell or otherwise dispose of the property; and certainly before they shed this mortal coil. Otherwise, death, would constitute the ultimate statute of limitations. Furthermore, land encumbered by confiscatory regulations is difficult enough to sell. If purchasers of property had no hope of challenging the application of the regulations, then such property will be all that more difficult to sell. The adverse effect of the notice rule on the alienability of property will become an increasing problem in the years ahead as property becomes less and less valuable with each new regulation and new owner. *See, e.g., Lopes v. City of Peabody*, 629 N.E.2d 1312, 1315 (Mass. 1994) (such a rule would affect "free transferability of real estate," "tend to press owners to bring actions . . . of doubtful validity before selling," and result in a "crazy-quilt" pattern of enforceability).

If this Court rejects the notice rule, buyers will be able to ripen and pursue regulatory takings claims. The discount on the purchase price will be substantially less, reflecting only the transaction costs of permitting and potential litigation. The seller will receive something closer to the true value for the property, the buyer will receive fair compensation if the lot is actually taken, and the government will not wind up holding development rights to all regulated property that the original owners (those at the time a regulation is adopted) were not able to exercise before divesting the property.

In short, a legal regime in which the buyer of regulated property can ripen and pursue a regulatory taking claim is the only regime that will fully protect both buyers and sellers of property from unjust burdens while avoiding an unjust windfall to the government.

III

PROPERTY DOES NOT HAVE ECONOMICALLY VIABLE USE JUST BECAUSE IT HAS A NONZERO VALUE

The State of Rhode Island refused to give Mr. Palazzolo a permit to develop his property because his plans did not serve "'a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests.'" JA at 27, CRMP, Sect. 130(A)(1). By retaining the property in its natural state, the state has obtained the use of Mr. Palazzolo's land for "refuge and feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds," "access of [f]auna to cover areas," facilitates "the exchange of nutrient/waste products," and allows "sediment trapping," "flood storage," and "nutrient retention." JA at 27, CRMC Decision. It is undisputed that CRMC was not going to give Mr. Palazzolo permission to fill a single acre of wetland for his own economic use. *See* Discussion, Page 12; JA at 73-74, Testimony of Grover Fugate, JA at 94, Testimony of David S. Reis. Clearly, the state is using Mr. Palazzolo's property for the public purpose of providing benefits to the public as a whole. Yet the court below held out the possibility that Mr. Palazzolo might develop a single homesite with an alleged value of $200,000, or obtain $157,500 for it as an open-space gift, and held Mr. Palazzolo "had not been deprived of all beneficial use of his property." Opinion, PA at A-12-13. Mr. Palazzolo, it may be recalled, alleged that the value of his property was $3,150,000 at the time it was taken. Opinion, PA at A-13.

The third question presented to this Court is "whether the remaining permissible uses of regulated property are *economically viable* merely because the property retains a value greater than zero." In this case, the court below was too quick to dismiss the takings claim merely because there may have been some nominal remaining value. First, the holdings of this Court in *Agins* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, cannot be avoided by the simple expedient of leaving a landowner with a few crumbs of value, especially when the state has turned valuable private property into a de facto nature reserve. Second, the tremendous disparity between the fair market value of the property in its preregulated state, and its nominal value after the permit denials, deprives Mr. Palazzolo of any reasonable return on the property and therefore denies him economically viable use. Third, even assuming that some use remains, albeit a nominal use, of a portion of the property, the wipeout of the great bulk of the property should be subject to the same rule as a physical invasion of that same property. Finally, under the ad hoc three part analysis of *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, Mr. Palazzolo has stated a credible claim that he is entitled to an award of takings damages.

A. *Agins* and *Lucas* Mandate That a Taking Should Be Found When There Is a Denial of Economically Viable Use and Land Must Be Retained in Its Natural State

Just because the state finds that there is some small value remaining in the property does not obviate the possibility that a taking has occurred, especially when that small value does not overcome the clear implication that Mr. Palazzolo has been denied the economically viable use of his property. This Court wrote in *Lucas*

> that regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm.

505 U.S. at 1018.

In this case, there is no question of "heightened risk." The State of Rhode Island *is* most assuredly pressing 18 acres of Mr. Palazzolo's property into public service. Its regulations expressly require that property of this nature be put to a "compelling public purpose." There can also be little question that at the time Mr. Palazzolo is held to have acquired the property, in 1978, 18 acres of wetlands on the Rhode Island coast was valuable investment property. But the court below found that because of the putative value of a single home on a small upland portion of Mr. Palazzolo's property, he did not fall under the umbrella of the Takings Clause. Opinion, PA at A-13. But it is not that simple. Mr. Palazzolo alleged that the value of his property was $3,150,000. The state suggests that he could have possibly built a single home worth $200,000 or that the land was worth $157,500 as an open space gift. *Id.* But the fact that the state has left a few crumbs on the table, in the

amount of 5 to 6.3% of the alleged value of the property, does not mean that Mr. Palazzolo has been left anything close to the economically viable use of his property.

"Economically viable use" must mean something more than a value greater than zero. This Court articulated the two part takings test in *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citations omitted), where it held:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land . . . .

This Court never reached the question of whether there had been a taking in *Agins* because the plaintiff there had never pursued the full extent of the permit process. But there is no suggestion in that opinion that a denial of economically viable use would be found only in the extraordinary circumstance that the property was left with absolutely no use or value.

There are two significant instances where this Court has found the possibility of a taking because of a denial of economically viable use. The first is *Lucas*. That was a case with extremely unusual facts because this Court was presented with a situation where the lower courts had concluded that *all* use and value of the property had been destroyed. Indeed, some members expressed skepticism on the appropriateness of accepting such a characterization from the South Carolina courts. *See* 505 U.S. at 1033-34 (Kennedy, J., concurring).

Lucas was a relatively easy case to find a loss of economically viable use because of the lower court determination of a total wipeout. But that opinion also made it plain that a total wipeout was not the sine qua non of a denial of economically viable use. In response to a concern raised by Justice Stevens in dissent, the Court noted that acceptance of a

regulatory taking in *Lucas* did not mean that a "landowner whose property is diminished in value 95% recovers nothing." 505 U.S. at 1019 n.8. There is certainly no reason why a denial of economically viable use must be confined only to those circumstances where an owner has lost everything. A business venture that held out the prospect of leaving the owner, as here, with 6.3% of the value of its holdings would assuredly not be considered "economically viable." While it is not the government's role to guarantee that investors will not lose 93.7% of the current value of their holdings, the government cannot avoid all culpability when, as here, it has decided to divert the investment to another "compelling public purpose" resulting in the 93.7% loss of present value.

In contrast to the total wipeout of *Lucas*, this Court upheld a finding of a regulatory taking in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In that case, the Ninth Circuit evaluated whether the sale to the state of a conservation easement for some $800,000 *more than the original sales price paid by the landowner* obviated the finding of a taking. *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 95 F.3d 1422 (9th Cir. 1996). It did not. The court rejected the city's argument that "because Del Monte sold the [property] to the State of California for $800,000 more than it paid, economically viable uses for the property must have existed." 95 F.3d at 1432.[11]

In the present case, when the trial court heard testimony on the economic return from converting the entire property into a single home site, it merely heard estimates of the cost of upgrading a road to the homesite and the value of a comparable single homesite. To this figure the state "added value" of $7,000 per acre for 19 acres of wetlands and isolated uplands that Mr. Palazzolo cannot touch. *See* JA at 103-04, Testimony

[11] It is also worth mentioning that the jury found that Del Monte Dunes had been denied "economically viable use." 526 U.S. at 700.

of Thomas S. Andolfo, CRMC's expert appraiser. In other words, the court derived two-thirds of its $200,000 figure by imputing private benefits from the land being pressed into public service. The courts below, however, did not consider at all whether the proffered house would be economically feasible in light of its costs—including the costs of raising the grade of the lot, the installation of a septic system, whether any wetlands would have to be filled in upgrading the road, and the lost opportunity costs of not building on the remaining lots. Nor did the courts below consider whether Mr. Palazzolo would receive a viable return on the four-decade long investment in the property, or whether the residual value was economically significant in light of the $3,150,000 in lost value he has alleged. These are questions that the court below should have, but did not, address in reaching the conclusion of whether Mr. Palazzolo had suffered a denial of economically viable use.

When viewed in light of the these questions it should be plain that the courts below too cavalierly dismissed the possibility that Mr. Palazzolo suffered the type of taking envisioned by this Court in *Agins*. Nor does this Court's economically viable use formulation mean that a taking cannot be found in the present case. Indeed, if it were otherwise, then the "leaving-crumbs-on-the-table exception to economically viable use would quickly overwhelm the *Agins* rule.[12]

[12] Or, as the Court of Federal Claims recently said, a rule that immunizes the government from takings liability because there is some nominal value remaining would be irrational and wrong:

> The notion that the government can take two thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not

(continued...)

B. Mr. Palazzolo Has Been Denied a Reasonable Return on His Property and Has Been Denied Economically Viable Use of His Property

To determine whether a landowner has been denied economically viable use a court might begin by asking whether the regulations are denying the landowner a reasonable return on the property. This would be consistent with the emphasis in *Penn Central* on the "reasonable return" allowed by the Landmarks Law and this Court's admonition that if economic circumstances changed, the result could be the deprivation of economically viable use. 438 U.S. at 138 n.36.

In this case, where the existence of the taking is disputed by virtue of a pittance remainder in value (the $200,000 homesite or $157,000 open space gift), it is appropriate to first determine whether that remainder constitutes a reasonable return on Mr. Palazzolo's property—both in terms of its value and use. For a starting point, a court can compare the remaining value of Mr. Palazzolo's property—$157,000 as a gift, or $200,000 as a homesite—with the reasonably foreseeable uses of his property when he acquired it. Those uses, of course, would have been consistent with 74 subdivided lots in a popular beach resort area with "moderate-to-heavy density seasonal development," JA at 21, CRMC Biologist's Report. If one were to compare the fair market value of developable property when he acquired it in 1978, to the alleged remainder value of $200,000—then it could be estimated whether Mr. Palazzolo has received anything close to a reasonable return.

---

[12] (...continued)

> barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Florida Rock Industries, Inc. v. United States, 45 Fed. Cl. 21, 23-24 (1999).

Unfortunately, in its haste to dispose of Mr. Palazzolo's claims, the court below never reached the issue of what the fair market value of Mr. Palazzolo's property actually was in 1978 when he acquired the property. Nor did it make a conclusive determination of what the fair market value was in 1986 when the last permit application was denied. Nevertheless, what the court should have done was to estimate that fair market value and consider whether Mr. Palazzolo had realized anything but a substantial *negative* return on the original fair market value of the property. Concomitantly, the court should have compared the original uses of the property (potential subdivision or beach club development) and compared those uses to what Mr. Palazzolo was left with (single potential homesite and dedication of 18 acres to a nature preserve). As this Court noted in *Lucas*, an important element of property is profit: " 'For what is the land but the profits thereof[?]' 1 E. Coke, Institutes, ch. 1, § 1 (1st Am. ed. 1812)." *Lucas*, 505 U.S. at 1017. Lord Coke was referring, of course, not to a mere money return but the productive *use* of property.[13] Surely this

> implies that return on investment may be a significant criterion of post-regulation, economically beneficial use, and that a nondevelopment use may be considered not an economically viable use.

William S. Walter, *Appraisal Methods and Regulatory Takings: New Directions for Appraisers, Judges, and Economists*, 73 Appraisal J. 331, 341 (1995). With the development of the relevant facts, the court below should have been able to

---

[13] Coke was discussing estates of land at 17th Century common law, in which context a "profit" signified a specific beneficial use of the land, i.e., its employment in "vesture, herbage, trees, [or] mines." 1 E. Coke, Institutes of the Laws of England, ch.1, § 1(4)(g) (1st Am. ed. 1812). An accurate contemporary paraphrase of Coke would therefore be, "for what is the land but the beneficial use thereof?"

determine whether Mr. Palazzolo had been denied a reasonable return on his property in terms of its remaining uses and value.

The advantage to a court in determining whether a claimant has received a reasonable return on a property as a yardstick for determining whether there has been a denial of economically viable use is that it can result in a more objective analysis than can a focus on "expectations." This is especially true when, as here, the analysis of expectations can become mired in allegations of "notice" of the regulations by the claimant. Furthermore, courts have had significant experience in analyzing the fairness of rate of return in the context of both due process and takings analyses. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989). While the review process is by no means simple there is at least substantial judicial experience in such economic review, and an advantage over speculating on subjective expectations. Indeed, there may be little alternative if a proper balance between the need to accommodate economic regulations and the importance of adhering to the purpose of the Takings Clause is to be maintained.

C. The Conversion of a Substantial Portion of Mr. Palazzolo's Property into a Nature Reserve Has the Same Effect as a Physical Invasion

As Justice Brennan explained in his dissent in *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621 (1981):

> Police power regulations such as zoning ordinances and other land-use restrictions can destroy the use and enjoyment of property in order to promote the public good just as effectively as formal condemnation or physical invasion of property . . . . From the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wildlife refuge through formal

> condemnation or increasing electricity production through a dam project that floods private property.

Id. at 652 (Brennan, J., dissenting), *accord Lucas*, 505 U.S. at 1018.[14]

Traditionally, when government has sought to preserve property as a wildlife refuge it has condemned and paid for the interests that it has taken. There is a long and continuing tradition for government to condemn scenic and related easements. As this Court noted in *Lucas*:

> The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation.

505 U.S. at 1018-19. This Court in *Lucas*, of course, discussed the existence of such servitudes in the context of finding that there is an equivalence between regulations that take away economically viable use of property and physical invasions.

---

[14] On another occassion, Justice Brennan considered a distinction between "physical and nonphysical intrusions" to be "outmoded." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 447 (1982) (Brennan, J., dissenting). *See also Bridge Company v. United States*, 105 U.S. 470, 502 (1881) (Field, J., dissenting) ("There are many ways of taking property other than by occupation or appropriation, which are within the constitutional inhibition. If its beneficial use and enjoyment are prevented under the sanction of law, it is taken from him as effectually as though the title were condemned."); *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1572 (Fed. Cir. 1994) ("The fact that the source of any particular taking is a regulation rather than a physical entry should make no difference—the nature of legal interests defining the property affected remains unchanged."), *cert. denied*, 513 U.S. 1109 (1995).

The consideration should be no different in this case, where Mr. Palazzolo has lost the use of his wetlands so that it may be preserved for habitat and scenery.

As with physical invasions, it also should make no difference that only part of Mr. Palazzolo's property, albeit a very substantial part, has been taken. Just as a physical invasion of only a small portion of a property is compensable, *see Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, the functional equivalent (i.e., denial of economically viable use) on a significant portion of the property should also be compensable. *Lucas*, 505 U.S. at 1016 n.7. *See also* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994) (suggesting a test wherein "any identifiable segment of land is a parcel for purposes of regulatory taking analysis if prior to regulation it could have been put to at least one economically viable use, independent of the surrounding land segments"); *Machipongo Land and Coal Company v. Commonwealth of Pennsylvania*, 719 A.2d 19 (Penn. App. 1998) (adopts Fee test). *See also Boise Cascade Corporation v. Board of Forestry*, 935 P.2d 411 (Ore. 1997) (a landowner who was prohibited from logging 56 acres on a 64-acre tract because of a spotted owl nest stated a claim for a regulatory taking); *American Savings and Loan Association v. County of Marin*, 653 F.2d 364 (9th Cir. 1981) (taking claim stated when regulation denies use of portion of parcel).

Indeed, there is ample precedent in support of the doctrine that there can be a regulatory taking of something less than the total parcel of real property. *See, e.g., First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987) (holding that compensation would be available for a temporary taking), and *Preseault v. Interstate Commerce Commission*, 494 U.S. 1 (1990) (finding that an alleged taking of a reverter on an easement was justiciable under the Tucker Act). Ultimately, a taking of the reverter was found by the Federal Circuit in *Preseault.*

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996). *See also Hodel v. Irving*, 481 U.S. 704 (1987) (taking of rights of descent and devise); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (same). Finally, in a case of note, the Federal Circuit upheld an award of $60 million, plus interest, for a taking of a coal deposit, despite allegations that the right to farm the surface remained. *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169, 1174 (Fed. Cir.), *cert. denied*, 502 U.S. 952 (1991).

In short, because the effect to Mr. Palazzolo of sterilizing all use of 18 acres of his property is no different from the effect of physically invading that property, this Court should find that he has stated a claim for a regualtory taking.

D. Under the Balancing Test of *Penn Central*, Mr. Palazzolo Has Stated a Claim for a Regulatory Taking of His Property

Before this Court developed the "economically viable use" test in *Agins* it had formulated what has become known as the three part test of *Penn Central Transportation Co. v. City of New York*, 438 U.S. at 124. This test requires that courts weigh (1) the regulation's economic impact; (2) the regulation's interference with distinct investment-backed expectations; and (3) the character of the government action. *Id.*

It is important to recognize, of course, that this test was formulated against a backdrop of a plaintiff who already had a viable railroad terminal in operation on the property and where the claimant also had several other valuable parcels in the vicinity—parcels that could have received permission to develop in excess of current zoning regulations. While the restriction at issue in *Penn Central* was severe, it was not even close to the overall percentage of impact caused by the restriction here.

Nevertheless, if a court were to analyze Mr. Palazzolo's situation in light of the factors articulated in *Penn Central* it should be clear that he has stated a claim for a regulatory taking.

1. Mr. Palazzolo Has Suffered a Severe Adverse Economic Impact

The regulation's impact on Mr. Palazzolo, as noted above, has been extreme. He alleges that the value of his property, without the regulatory denials, would be $3,150,000. The state suggests it may allow a use of the property it values at $200,000. In other words, Mr. Palazzolo claims to have lost 93.7% of his property's value.[15] Alternatively, the court below could have recognized that the $200,000 represents an inadequate return on investment when compared to the value of the property in 1978. Lastly, Mr. Palazzolo is precluded from using at least 18 acres of his approximately 20 acre parcel, a state of affairs with an obvious negative economic impact. Any way of looking at this, the courts below should have been able to determine that Mr. Palazzolo suffered a massive and severe economic impact.

2. Mr. Palazzolo's Investment Backed Expectations Have Been Severely Curtailed

The court below, as noted, believed that because Mr. Palazzolo had acquired his property in 1978, several years after the imposition of the relevant CRMP regulations, that he had no reasonable investment backed expectations to use his property. But it is not at all clear why an acquirer of real property, especially one who acquires property by operation of law, should be held not to have had the reasonable expectation of acquiring *all* the legal rights of the prior owner.

Furthermore, this Court has held that the mere existence of a permitting requirement does not preclude the economically viable use of the property. *See United States v. Riverside*

---

[15] As suggested by this Court in *Lucas*, such a severe diminution in use and value might well constitute, by itself, a regulatory taking. 505 U.S. at 1019 n.8. The Federal Circuit has adopted the doctrine of partial regulatory takings and the Court of Federal Claims has applied it. *See Florida Rock*, 18 F.3d 1560 (establishing rule for circuit).

Bayview Homes, 474 U.S. at 127. The courts below never adequately explored whether it would have been reasonable for a person in Mr. Palazzolo's position to expect that he could develop homes on the property like those found in nearby areas or, if use were denied, to receive just compensation.

Finally, it is unreasonable for the court below to charge Mr. Palazzolo with knowledge that the very real effect of the regulations would be to allow the transfer to the government of substantial interests in his real property at no cost. It is too inconsistent with the purpose of the Takings Clause—to ensure that "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

3. The Character of the Government Action and the Purpose of the Regulations Suggest a Taking Has Occurred

The state denied Mr. Palazzolo's beach club application because the property, in its undeveloped state, currently serves an assortment of public purposes. The beach club would not serve a "compelling public purpose." Although the State of Rhode Island refrained from exercising its condemnation power in this case, the regulations and the reasons given for the permit denial make clear the character of the government action was to obtain Mr. Palazzolo's property for express public purposes. The regulation goes so far as to preclude uses that would benefit "individual or private interests." This was acquisition of private property for public use in all but name.

Because, as Justice Holmes said, government cannot take a "shorter cut than the constitutional way of doing things," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 416, Mr. Palazzolo should not have to bear the entire burden of protecting these wetlands. Thus, under the balancing test of *Penn Central*, Mr. Palazzolo has stated a claim for a regulatory taking.

CONCLUSION

For the reasons stated above, this Court should hold (1) that Mr. Palazzolo's claim for regulatory taking was ripe, (2) that the existence of wetlands permitting regulations in 1978 does not preclude him from pursuing a regulatory taking claim based upon the application of those regulations, and (3) the potential existence of minimal use and value in property does not obviate a regulatory takings claim based upon an alleged denial of economically viable use.

DATED: November, 2000.

Respectfully submitted,

JAMES S. BURLING
Counsel of Record
ERIC GRANT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

JAN 3 2001

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF FOR RESPONDENTS

BRIAN A. GOLDMAN, ESQ.
GOLDMAN & BIAFORE
101 Dyer Street, No. 301
Providence, RI 02903
(401) 274-1300

RICHARD J. LAZARUS
GEORGETOWN UNIVERSITY
LAW CENTER
600 New Jersey Avenue, N.W.
Washington, DC 20001
Of Counsel

SHELDON WHITEHOUSE
Attorney General
MICHAEL RUBIN
Counsel of Record
Assistant Attorney
General
Department of the
Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400 Ex. 2297

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether an as-applied regulatory takings claim is ripe even when the land owner has: (1) never applied to undertake any activity on the buildable less-regulated, more-valuable portion of the property; (2) never applied to obtain any approval from the agency having initial jurisdiction over the development plan that serves as the basis of his claim of value; (3) nor applied to obtain any approval from the defendant agency for such development.

2. Whether a takings claimant has established deprivation of all economically viable use of his parcel when the claimant can build at least one residence on the property, thereby giving the property itself a fair market value of at least $200,000 (1986 dollars), far in excess of his monetary investment, and when, furthermore, the denied use was not itself economically viable.

3. Whether a land owner possesses the inherent right to fill coastal marshland, regardless of the severity of the adverse environmental and health effects on neighboring property owners and on his own successors, even when a comprehensive state regulatory program substantially restricting such filling in that very kind of coastal marshland predated the land owner's acquisition of the property.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

I. THE LAND 1

II. THE POTENTIAL HARM 5

III. RHODE ISLAND'S REGULATORY PROGRAMS 7

A. Sewage Regulation 7

1. At the time of Palazzolo's applications 7

2. Historical background 8

B. Coastal Regulation 9

1. At the time of Palazzolo's applications 9

2. Historical background 10

IV. OWNERSHIP AND DEVELOPMENT OF THE PARCEL 13

V. APPLICATIONS WITH RESPECT TO THE PARCEL 13

A. The "Harbors & Rivers" Applications 13

B. The Coastal Council Applications 14

C. Development Potential 15

1. Buildable upland 15

2. Possibility of approval for more 16

THE DECISIONS BELOW 16

A. Superior Court 17

B. Supreme Court 17

SUMMARY OF ARGUMENT 18

ARGUMENT 20

I. THE RHODE ISLAND COURT CORRECTLY DECIDED THAT PALAZZOLO'S AS-APPLIED REGULATORY TAKINGS CLAIM WAS NOT RIPE 20

A. Palazzolo Failed to Apply for the Subdivision Proposal He Claims to Have Been Denied 21

B. Palazzolo's Applications for Development Before the State Agency and His Ripeness Argument Before This Court Both Exclude His Parcel's Valuable, Dry Upland Areas...25

C. Palazzolo's Findings Were "Exceedingly Grandiose" and Redundant 27

II PALAZZOLO'S CLAIM THAT HE HAS BEEN DENIED ALL "ECONOMICALLY VIABLE USE" OF HIS PARCEL LACKS MERIT.....29

A. Palazzolo's Parcel Retains Substantial Economic Value for Residential Use 31

B. Palazzolo Failed to Establish That His Development Uses Were Themselves "Economically Viable".....33

III PALAZZOLO'S CLAIMS ARE BARRED BY RESTRICTIONS THAT PREDATE HIS ACQUISITION.....34

A. Antecedent "Background Principles of State Law" Are Significant Under *Lucas* 35

B. The Relevant "Background Principles of State Law" Under *Lucas* Are Not Confined to Those Supplied By Common Law Doctrine.....38

C. Under *Lucas*, Background Principles Supplies By State Law Defeat Any Takings Claim 42

IV *PENN CENTRAL'S* ANALYSIS DOES NOT SUPPORT PALAZZOLO'S TAKINGS CLAIM..... 47

CONCLUSION..... 50

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 29, 42

Allen v. Allen, 32 A. 166 (R.I. 1895) 45

Alden v. Maine, 527 U.S. 706 (1999)..... 49

Annicelli v. Town of South Kingstown, 463 A.2d 133 (R.I. 1983).....2, 8

Baker v. Schofield, 243 U.S. 114 (1917)..... 32

Bailey v. Burges, 11 R.I. 330 (1876)..... 44

Bd. of Regents of State Colleges v. Roth, 408 U.S. 564 (1972)..... 35

Bd. of Purification of Waters v. East Providence, 133 A. 812 (R.I. 1926).....8, 22, 46

Citizens for Preservation of Waterman Lake v. Davis, 420 A.2d 53 (R.I. 1980) 43

City of Newport v. Newport Water Corp., 189 A. 843 (R.I. 1937)..... 42

City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va. 1998)..... 40

Clarke v. City of Providence, 15 A. 763 (R.I. 1888)..43, 44

Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993)..... 25

Cottonwoods Farms v. Board of County Commissioners of County of Jefferson, 763 P.2d 551 (Colo. 1988)..... 40

Dawson v. Broome, 53 A. 151 (R.I. 1902) ...7, 12, 13, 44, 45

Forest Properties, Inc. v. United States, 39 Fed. Cl. 56 (1997) 28

TABLE OF AUTHORITIES – Continued

Page

Gerhard v. Bridge Comm'rs, 5 A. 199 (R.I. 1886) ...44, 45

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991)..... 21

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999) 46

Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995)..... 44

Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) 42

Horton v. Old Colony Bill Posting Co., 90 A. 822 (R.I. 1914)..... 46

Hunziker v. State, 519 N.W.2d 367 (Iowa 1994)..... 40

Jackvony v. Powel, 21 A.2d 554 (R.I. 1941)..... 7, 43, 44

Karam v. New Jersey Dep't of Envtl. Prot., 705 A.2d 1221 (N. J. Super. Ct. App. Div. 1998)..... 41

Lanmar Corp. v. Rendine, 811 F. Supp. 47 (D.R.I. 1993)..... 48

Legal Tender Cases, 79 U.S. (12 Wall.) 457 (1871) 37

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 47

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)..... 46

Lucas v. South Carolina Coastal Council, Inc., 505 U.S. 1003 (1992) ..... *passim*

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 18, 21, 27

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998)..... 29

TABLE OF AUTHORITIES – Continued

Page

Milardo v. Coastal Resource Management Council, 434 A.2d 266 (R.I. 1981) 8

Mugler v. Kansas, 123 U.S. 623 (1887) 43

Munn v. Illinois, 94 U.S. 113 (1876) 40

NCAA v. Bd. of Regents of the University of Oklahoma, 468 U.S. 85 (1984) 32

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 36

Payne & Butler v. Providence Gas Co., 77 A. 145 (R.I. 1910) 7, 43

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978) ..... *passim*

Pennell v. City of San Jose, 485 U.S. 1 (1988) 32

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 37

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 10

RCK Properties, Inc. v. United States, 528 U.S. 951 (1999) 28

R.I. Dep't of Mental Health, Retardation & Hosps. v. R.I. Council 94, AFSCME, 692 A.2d 318 (R.I. 1997) 46

R.I. Motor Co. v. City of Providence, 55 A. 696 (R.I. 1903) 45

R.I. Ophthalmological Soc'y v. Cannon, 317 A.2d 124 (R.I. 1974) 24

Rogers v. Lane, 458 U.S. 613 (1982) 32

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 20, 43, 46, 47

TABLE OF AUTHORITIES – Continued

Page

Santini v. Lyons, 448 A.2d 124 (R.I. 1982) 9

Shalvey v. Zoning Bd. of Review, 210 A.2d 589 (R.I. 1965) 48

Soon Duck Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) 40

S. Pac. Transp. Co. v. City of Los Angeles, 922 F.2d 498 (9th Cir. 1990) 21

Sundin v. Zoning Board of Review of the City of Warwick, 200 A.2d 459 (R.I. 1964) 9

Tabb Lakes, Ltd., v. United States, 10 F.3d 796 (Fed. Cir. 1993) 26

Tantimonaco v. Zoning Bd. of Review, 232 A.2d 385 (R.I. 1967) 48

Town of Warren v. Thornton-Whitehouse, 740 A.2d 1255 (R.I. 1999) 44

Towson v. Moore, 173 U.S. 17 (1899) 32

United States v. Carolene Prods. Co., 304 U.S. 144 (1938) 29

United States v. Causby, 326 U.S. 256 (1945) 40

United States v. Chem. Found., 272 U.S. 1 (1926) 32

United States v. Commercial Credit Co., 286 U.S. 63 (1932) 32

United States v. Dickinson, 331 U.S. 745 (1947) 32

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 10

Unity Ventures v. County of Lake, 841 F.2d 770 (7th Cir. 1988) 21

TABLE OF AUTHORITIES – Continued

Page

Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) 24

Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 27

Wooten v. South Carolina Coastal Council, 510 S.E.2d 716 (S.C. 1999) 40

CONSTITUTIONS, STATUTES AND RULES:

Federal Water Pollution Control Act Amendments of 1972 (as amended), 33 U.S.C. §§ 1341, 1344 (1982) 9, 10

Rivers and Harbors Appropriations Act of 1899, 33 U.S.C. § 403 (1982) 10

R.I. Royal Charter of 1663, *repealed by* R.I. Const. of 1843, *available at http://www.state.ri.us/rihist.richart.htm* 44

R.I. Const. art. 1, § 16 44

R.I. Const. art. 1, § 17 ..... 7, 40, 43

R.I. Gen. Laws ch. 112, §§ 1, 8-11, 13 (1938) 12

R.I. Gen. Laws ch. 118, § 14 (1896) 43, 45

R.I. Gen. Laws ch. 118, §§ 3-6, 10-12, 14 (1896) 11

R.I. Gen. Laws ch. 118, §§ 7, 10, 14 (1896) 12

R.I. Gen. Laws ch. 118, § 11 (1896) 12

R.I. Gen. Laws §§ 42-35-1 to 42-35-18 (1984 Reenactment & Supp. 1996) 15

R.I. Gen. Laws § 46-12-1(n), 46-12-2(b), 46-12-5 (1980 Reenactment & Supp. 1983) 10

TABLE OF AUTHORITIES – Continued

Page

R.I. Gen. Laws § 46-12-2 & compiler's note (1956) 8

R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(l) (1980 Reenactment & Supp. 1983) 7, 8

R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(m) (1970 Reenactment & Supp. 1978) 7

R.I. Gen. Laws § 46-12-3 (1980 Reenactment & Supp. 1985) 7

R.I. Gen. Laws § 46-23-1, 42-23-6(A) (1970 Reenactment & Supp. 1971) 9

R.I. Gen. Laws § 46-23-1 (1980 Reenactment) 4, 9

1876 R.I. Acts & Resolves ch. 556, §§ 3-4, 7 11

1918 R.I. Pub. Laws ch. 1669, § 2 11

1920 R.I. Pub. Laws ch. 1914, § 2 8

1921 R.I. Pub. Laws ch. 2090 8

1935 R.I. Pub. Laws ch. 2250, §§ 60, 64 11

1935 R.I. Pub. Laws ch. 2250, §§ 110, 115 8

1939 R.I. Pub. Laws ch. 660, §§ 100, 101 11

1963 R.I. Pub. Laws ch. 89, § 2 8

1965 R.I. Pub. Laws ch. 26, § 1 11

1965 R.I. Pub. Laws ch. 137, § 1 11

1965 R.I. Pub. Laws ch. 140, § 1 ..... 10, 11

1966 R.I. Pub. Laws ch. 261, § 4 8

1971 R.I. Pub. Laws ch. 279 ..... 9, 41

1977 R.I. Pub. Laws ch. 182, § 2 ..... 7, 8, 11

TABLE OF AUTHORITIES – Continued

Page

1977 R.I. Pub. Laws ch. 182 § 3 7

1977 R.I. Pub. Laws ch. 182, § 16 ..... 7, 8

1983 R.I. Pub. Laws ch. 149, § 1 7

OTHER AUTHORITIES:

Glenn D. Anderson & Steven F. Edwards, *Protecting Rhode Island's Coastal Salt Ponds: An Economic Assessment of Downzoning to Protect These Coastal Amenities*, 14 Coastal Zone Mgmt. J. 67 (1986) 6

Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* (photo. reprint 1983) (1826) 12

Mark D. Bertness, *The Ecology of Atlantic Shorelines* (1999) 2

1 William Blackstone, *Commentaries on the Laws of England* (photo. reprint 1979) (1765) 37, 38

Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39 24

Eutrophic Shallow Estuaries and Lagoons (Arthur D. McComb ed., 1995) 5

Garrett Hardin, *The Tragedy of the Commons* 162 Science 1243 (1968) 38

Oliver Wendell Holmes, *The Common Law* (1881), *reprinted in* 3 *The Collected Works of Justice Holmes* 115 (Sheldon M. Novick ed., Univ. of Chicago Press 1995) 37

TABLE OF AUTHORITIES – Continued

Page

Virginia Lee & Stephen Olsen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons*, 8 Estuaries 191 (1985) 5

John Locke, *Two Treatises of Government* (photo. reprint 1992) (1698) 36

William J. Mitsch & James G. Gosselink, *Wetlands* (Van Nostrand Reinhold Co. 1986) 4

Nat'l Ass'n of Science, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* (2000) 5

Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U.L. Rev. 313 (1990) 12

Scott W. Nixon, *Nutrients and Coastal Waters: Too Much of a Good Thing?*, 36 Oceanus 38 (1993) 5

Frank Postma et al., *Nutrient and Microbial Movement from Seasonally-used Septic Systems*, 55 J. Envtl. Health 5 (1992) 5

Random House Webster's Unabridged Dictionary (2d ed. 1997) 36

Alfred Redfield, *Development of a New England Salt Marsh*, 42 Ecological Monographs 201 (1972) 45

Restatement (Second) of Torts § 827 cmt. g 36

Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265 (1996) 41

TABLE OF AUTHORITIES – Continued

Page

Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977) 38

Boyce Thorne-Miller et al., *Variations in the Distribution and Biomass of Submerged Macrophytes in Five Coastal Lagoons in Rhode Island, USA*, 26 Botanica Marina 231 (1985) 5

STATEMENT OF THE CASE [1]

This is a regulatory takings claim brought by Anthony Palazzolo ("Palazzolo") based upon the Rhode Island Coastal Resources Management Council's ("the Coastal Council's") denial of his application to fill all or most of eighteen acres of coastal inter-tidal marshland on a larger piece of property that also includes buildable upland. The State and its Coastal Council defend on ripeness grounds that, *inter alia*, he compromised the record by completely evading the jurisdiction of state public health agencies, he failed to file an application for the whole parcel, and he never filed a true and meaningful application. Palazzolo's challenge also fails substantively since he retains substantial beneficial use and economic value in his property, and the forbidden uses are barred by background principles of state law and would not have been economically viable in any event.

I. THE LAND

The nature of the Palazzolo parcel must be understood for a proper decision. The Atlantic Ocean, beating against the New England shore beyond the shelter of Long Island, has raised up beaches of sand

---

[1] The undersigned provide this key to record citations: Tr.=trial transcript; PA=Appendix to the Petition for Writ of Certiorari; JA=Joint Appendix; JL1=Joint Lodging Number 1; JL2=Joint Lodging Number 2; RA=Respondents' Appendix (attached herein); Ex.=Exhibit. Plaintiff's exhibits are numbered while the defendants' exhibits are lettered. Unless otherwise indicated by the context, all citations to the Rhode Island General Laws are to the version of the General Laws in effect in 1983, when Palazzolo first applied to the Coastal Council for permission to fill a portion of Winnapaug Pond.

and a spine of buildable upland running along the shoreline. Behind the barrier of beach and upland are salt marshes and coastal ponds,[2] such as Winnapaug Pond.[3] The nature of the soil, a mucky peat, and tidal inundation render salt marshes unbuildable without massive alteration.[4] Behind the marshes and coastal ponds, the ground rises again to solid upland.

Development in the vicinity of Palazzolo's parcel reflects these natural conditions. The upland ridge between the Misquamicut beachfront and the marshes is readily buildable. Atlantic Avenue runs along this ridge, and private lots with summer cottages radiate from both sides of the roadway. *See* Ex. FF to JJ, S, Tr. 394-95, 659-60. *See also* Test. of Council Director Fugate, RA 36 (development "confined pretty well exclusively to the upland portion or the dry land portion that

---

[2] The contrast between the beach area and the marsh is particularly apparent on the 1939 and 1963 aerial photographs. JL1, tabs 1 & 2. *See also Annicelli v. Town of South Kingstown*, 463 A.2d 133, 137 (R.I. 1983) (describing the significance of Rhode Island's barrier beaches); Mark D. Bertness, *The Ecology of Atlantic Shorelines* (1999).

[3] Winnapaug Pond is comprised of 446 acres of open water plus 146 acres of salt marsh, including the eighteen acres that occupy most of the Palazzolo parcel. *See* Test. of Biologist Reis, Tr. 495; Engineer's 1985 Field Report at 3, RA 68; Biologist's 1985 Field Report at 2, RA 55.

[4] *See* Engineer's 1985 Report, JA 23 ("The highly compressible nature of mucky peat (among other poor engineering characteristics) makes the soil complex undesirable for a . . . base . . ."); *see also* Test. of Appraiser Andolfo, JA 104 ("[T]he development costs are extraordinary . . . [N]ot . . . financially feasible . . . ."); *see also* color photographs, JL1, tab 8 (depicting inundation of the site with Atlantic Avenue cottages in the background).

immediately abuts [the road].").[5] Aside from some very minor encroachments,[6] the Winnapaug marshlands on all the pond-side properties remain in their natural unfilled condition.[7]

The Palazzolo site begins on the spine of upland and descends northward from Atlantic Avenue into the salt marshes. The disparity between upland and marsh is evident: Palazzolo's upland acreage[8] is high and dry; by contrast, his marshland is subject to twice-daily tidal flooding and includes substantial portions below mean

---

[5] *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue).

[6] *See* Test. of Council Director Fugate, RA 36 ("[t]he development that has occurred in that area, except for two remnant structures or several remnant structures... has been all along the dry land area immediately abutting Atlantic Avenue.").

[7] Palazzolo's Statement of the Case suggests that Palazzolo's fill plans were consistent with neighborhood patterns: "Like the neighboring homes, the only way to develop Palazzolo's site is to raise the grade with fill." Pet. Br. 3. In fact, at most, only three out of the scores of homes in the vicinity were possibly built on fill in the marshlands and even these examples were uncertain. *See* Tr. 201, 204-05, 249-54. *See also* aerial photographs at JL2, items 2-7 (showing that the vacation homes are virtually all built on the uplands along Atlantic Avenue). As Palazzolo himself acknowledges, RA 79, there is no instance of fill for intensive subdivision ever being permitted in Winnapaug Pond's coastal marshlands.

[8] Palazzolo's submissions to this Court ignore the fact that two pieces of upland area were identified at trial. The existence of the second area of upland within Palazzolo's territory is discussed further at Statement of the Case V.C, *infra*.

high tide.[9] *See* PA A-3; n. 39, *infra*. Ponding in small pools occurs throughout these marshes. PA A-3.

Winnapaug Pond with its marshland serves as a common amenity to all the surrounding upland properties, providing scenic and recreational qualities that underpin premium real estate values for the buildable upland. Test. of Appraiser Coyle, Tr. 382, 389-93; JL1, tab 1 (aerial photograph); CRMP § 330; R.I. Gen. Laws § 46-23-1 (1980 Reenactment). The Pond's salt marshes absorb wastes that would otherwise overwhelm the pond; provide food and shelter[10] for an abundance of recreational and commercial fish and shellfish, which add to the attraction of pond-side living; and, by biologic and chemical processes too complicated to detail here, nourish and balance the pond.[11] More directly, the marshes protect the upland portions of the abutting properties from storm damage and absorb and contain tidal inundation. *See* 1985 Engineer's Report at 4, 6, 7, RA 68.

---

[9] We discuss *infra* at nn. 59, 60 the title issues presented by Palazzolo's ownership of the marshland acreage.

[10] Sheltered from the rough Atlantic seashore, the marshes are a natural nursery for sea fauna. Test. of Biologist Reis, JA 80-81, 84. *See also* William J. Mitsch & James G. Gosselink, *Wetlands* 539 (1986) ("Wetlands are among the most productive ecosystems that are found anywhere on the planet. In terms of gross and net primary productivity, salt marshes rank high . . .").

[11] Test. of Biologist Reis, JA 82 ("[t]he salt marshes provide primary production. They provide nutrients and lock up organic carbon into plant matter which then provides the basis for the food chain . . . up to the smaller fish, and then of course the larger fish. They are very important habitat . . . for those species, which are at the top of the food chain which provide commercial and recreational importance.").

II. THE POTENTIAL HARM

Salt ponds are fragile mechanisms, with limited ability to absorb wastes.[12] Large areas of the salt ponds are poorly flushed, which makes them valuable as fish and shellfish nurseries, but also particularly susceptible to the twin threats of bacterial contamination and eutrophication.[13]

Bacterial contamination, such as from failing septic systems, has obvious impacts on public health. Eutrophication can kill a pond.[14] Both bacterial

---

[12] *See* Virginia Lee & Stephen Olsen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons*, 8 Estuaries 191 (1985); *Eutrophic Shallow Estuaries and Lagoons* (Arthur J. McComb ed., 1995).

[13] *See* Boyce Thorne-Miller et al., *Variations in the Distribution and Biomass of Submerged Macrophytes in Five Coastal Lagoons in Rhode Island, USA*, 26 Botanica Marina 231 (1985); *nn. 11 & 12, supra.*; Br. Amici Curiae Dr. John Teal et al. *See also* Frank Postma et al., *Nutrient and Microbial Movement from Seasonally-used Septic Systems*, 55 J. Envtl. Health 5 (1992).

[14] Eutrophication, largely caused by septic systems, occurs when nitrogen causes oxygen levels to fall below the minimum required by fish and shellfish to survive. Eventually, waters become weed-choked and murky, the bottom becomes coated with black organic sediments, and anoxic conditions occur that can lead to the generation of toxic levels of malodiferous hydrogen sulfide. Test. of Biologist Reis, JA 83 ("Eutrophication is a condition where nutrients cause excess growth within the pond . . . causing anoxia, which is a lack of oxygen. [T]he shellfish at the bottom of the pond, and many of the fish in the water column, would be killed."). *See also* Scott W. Nixon, *Nutrients and Coastal Waters: Too Much of a Good Thing?*, 36 Oceanus 38 (1993); Nat'l Ass'n of Science, *Clean Coastal Waters: Understanding and Reducing the Effects of Nutrient Pollution* (2000).

contamination and eutrophication are hazardous to the high-quality economically productive and attractive resources of Winnapaug Pond.[15] Palazzolo's proposals put the Pond at serious risk.[16]

It was to safeguard against such harms, as well as health hazards, flooding[17] and direct habitat destruction, that Rhode Island developed its environmental programs.

---

[15] *See* Glenn D. Anderson & Steven F. Edwards, *Protecting Rhode Island's Coastal Salt Ponds: An Economic Assessment of Downzoning to Protect These Coastal Amenities*, 14 Coastal Zone Mgmt. J. 67 (1986).

[16] Individual sewage disposal systems, ISDS, are the largest contributor of "nitrogen" in the salt ponds. Test. of Biologist Reis, JA 86-87, 89 ("Q. Above and beyond the filling itself, did you consider what impact 74 ISDS or septic systems would have? A. I did perform some nutrient loading calculations. . . . [T]hat high level of loading would cause the eutrophication in the pond and the symptoms that go along with that."). The Superior Court found the proposal a public nuisance in part because of nitrate contamination. PA B-11.

[17] Another problem with development of the Palazzolo marshland is that it is a "high hazard area for construction" on a federally designated flood-plain. Test. of Council Director Fugate, Tr. 179; *see also* Test. of Engineer Caito, Tr. 311-12. Filling such an area displaces excess water and forces flooding elsewhere, Test. of Engineer Caito, Tr. 312-13, and the fill is inherently less stable than natural upland in flood conditions. Test. of Council Director Fugate, Tr. 180 ("subject to movement"); Test. of Engineer Clarke, Tr. 567-68 ("we'd have leach fields all over the place."). There are strict federal flood control regulations regarding the filling of land in such zones (whether wetland or otherwise). Test. of Engineer Caito, Tr. 312; Test. of Engineer Clarke, Tr. 566-68; *see also* FEMA Flood Control Manual, Ex. DDD, Tr. 645-46. Palazzolo has obtained *none* of these approvals.

III. RHODE ISLAND'S REGULATORY PROGRAMS

From colonial times, by common law and constitution, Rhode Island has protected public rights to tidal wetlands and private property interests long dependant upon these wetlands. Protections included the law of nuisance, *see, e.g., Payne & Butler v. Providence Gas Co.*, 77 A. 145, 152-531 (R.I. 1910) (destruction of shell-fish bed by pollution constitutes nuisance), the public trust doctrine, *see, e.g., Dawson v. Broome*, 53 A. 151, 154-58 (R.I. 1902), and "the right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941). More recently, comprehensive regulatory programs codify and derive from these longstanding public protections.

A. Sewage Regulation

1. At the time of Palazzolo's applications. Since 1977, the Rhode Island Department of Environmental Management ("DEM") has reviewed applications for individual sewage disposal systems ("ISDS") (generally, septic tanks) to protect public natural resources and public health.[18] At the time Palazzolo applied to fill the pond, as well as today, an ISDS system could be installed only upon DEM issuance of an ISDS permit, and then only upon DEM inspection.[19]

---

[18] *See* 1977 R.I. Pub. Laws ch. 182, §§ 2, 3, 16 (originally codified in relevant part as R.I. Gen. Laws § 42-17.1-2(*l*) (1977 Reenactment & Supp. 1978) and R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(m) (1970 Reenactment & Supp. 1978)).

[19] *See* R.I. Gen. Laws §§ 46-12-3(j), 46-12-3(k), 46-12-3(*l*) (1980 Reenactment & Supp. 1983); Deposition Test. of ISDS Chief Chateauneuf, at 10-12, 23-24, 32-33, Ex. W, Tr. 429-30; *see also Rules & Regulations Establishing Minimum Standards Relating to Location, Design, Constr. & Maint. of Individual Sewage Disposal Sys.* § SD 2.16 (1980), Ex. W-3, Tr. 429-30, 620. The relevant provisions of § 46-12-3 were slightly amended and redesignated as §§ 46-12-3(j), -3(k), and -3(*l*) in 1983. *See* 1983 R.I. Pub. Laws ch. 149, § 1. These

Obviously, an ISDS is necessary for a habitable dwelling in any area not served by a municipal sewer system.

2. Historical background. Prior to the transfer of regulatory power to the DEM, *see* 1977 R.I. Pub. Laws ch. 182, §§ 2, 16, the Rhode Island Department of Health ("RIDOH") had similar authority over septic systems. 1966 R.I. Pub. Laws ch. 261, § 4 (enacting R.I. Gen. Laws §§ 46-12-3(j) to 46-12-3(k)); *see Annicelli v. Town of South Kingstown*, 463 A.2d 133, 136 (R.I. 1983) (property owner obtaining ISDS permit from RIDOH prior to applying for municipal building permit).

This enactment was, in turn, preceded by a series of regulatory regimes, dating back to the early years of the last century, regulating sewage disposal.[20] *See, e.g., Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). Due to public health concerns, sewage disposal requirements have not been found to constitute takings by the State or by municipal regulation. *See, e.g., Milardo v. Coastal Res.*

---

provisions remained unchanged through 1985, when Palazzolo renewed his Coastal Council application. *See* R.I. Gen. Laws § 46-12-3 (1980 Reenactment & Supp. 1985).

[20] *See* 1920 R.I. Pub. Laws ch. 1914, § 2 (creating Board of Purification of Waters ("BPW")); 1921 R.I. Pub. Laws ch. 2090 (expanding BPW and its powers); 1935 R.I. Pub. Laws ch. 2250, §§ 110, 115 (transferring functions of BPW to Division of Purification of Waters within RIDOH); R.I. Gen. Laws § 46-12-2 & compiler's note (1956) (substituting term "Division of Sanitary Engineering" for "Division of Purification of Waters" "in accordance with present usage"); 1963 R.I. Pub. Laws ch. 89, § 2 (creating Division of Water Pollution Control within RIDOH).

Mgmt. Council, 434 A.2d 266, 269 (R.I. 1981) (state denial of ISDS permit not a taking); *Sundin v. Zoning Bd. of Review*, 200 A.2d 459, 461 (R.I. 1964) (delay of development due to lack of adequate sewage disposal not a confiscation).

B. Coastal Regulation

1. At the time of Palazzolo's applications. The Coastal Council was created in 1971, 1971 R.I. Pub. Laws ch. 279 (enacting R.I. Gen. Laws §§ 46-23-1 to 46-23-12), as "the principal mechanism for management of the state's coastal resources." R.I. Gen. Laws § 46-23-1 (1970 Reenactment & Supp. 1971). From the start, Rhode Island singled out the coastal zone for comprehensive and coordinated long-range planning and management, R.I. Gen. Laws §§ 46-23-1, 42-23-6(A) (1970 Reenactment & Supp. 1971); *see Santini v. Lyons* 448 A.2d 124, 127 (R.I. 1982), and established the Coastal Council as the final arbiter of development in or adjacent to the coastal zone, *after* other agencies provided any necessary preliminary permits.[21]

---

[21] The "Coastal Council goes last" policy is quite strong, finding expression in the Coastal Council's procedural rules, *see* Management Procedures § 4.2(4), RA 22-23, and in the Coastal Council's substantive regulations as well. *See* CRMP § 300.1(2); *see also id.* § 300.3(B), RA 19-20. Simply put, one cannot even approach the Coastal Council for a non-sewered subdivision unless one has in hand ISDS approvals from DEM. *See* CRMP § 300.6, "Sewage Treatment and Disposal." RA 20. In addition to the Coastal Council assent and ISDS approval, Palazzolo would need an approval letter from the municipality confirming that the subdivision met municipal zoning and subdivision code requirements. Management Procedures § 4.2(4), RA 22-23. He would also need water quality certification approval from DEM pursuant to the requirements of sections 401 and 404 of the Federal Water Pollution Control Act Amendments of 1972 (as amended),

The Coastal Resources Management Program ("CRMP" or "the Plan") provides that all alterations and projects proposed for tidal waters or areas contiguous to shoreline features shall require a Coastal Council assent (*i.e.*, permit). CRMP § 100.1. Under the Plan, filling in the coastal wetlands themselves is generally prohibited absent a "special exception." *See* CRMP §§ 100, 110 & Table 1, 130. Residential construction is not the basis of such a "special exception." *See* CRMP § 130; JA 72-73. Upland areas within 200 feet of coastal wetlands, however, are not similarly subject to a prohibition on filling and residential construction. CRMP §§ 100.1(A), Table 1A, 110.1. A landowner may apply for a "variance", which is more freely available. *See* CRMP § 120.

2. Historical background. The General Assembly enacted earlier protections for the "coastal wetlands" of the State in 1965. *See* 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-13 (repealed effective

---

33 U.S.C. §§ 1341, 1344 (1982). *See* R.I. Gen. Laws §§ 46-12-1(n), 46-12-2(b), 46-12-5 (1980 Reenactment & Supp. 1983) (authorizing DEM to implement federal clean water laws); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 704-08 (1994) (discussing application of § 401); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 123 (1985) (discussing application of § 404, 33 U.S.C. § 1344). In addition, Palazzolo would need to obtain approval from the Army Corps of Engineers and other federal agencies under both section 404, 33 U.S.C. § 1344, and section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403 (1982). *See PUD No. 1*, 511 U.S. at 722-23 (concerning § 10 permits); *see also* Test. of Council Director Fugate, JA 66-67. Thus, even had the Coastal Council assented, Palazzolo was still a long way from putting dirt into these marshlands.

1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). The Department of Agriculture & Conservation[22] was the permitting body for activities in such areas. A coastal wetland was defined as "any salt marsh bordering on the tidal waters of [Rhode Island], whether or not the tide water reach the littoral areas through natural or artificial water courses, and such uplands contiguous thereto, but extending no more than fifty (50) yards inland therefrom." 1965 R.I. Pub. Laws ch. 140, § 1 (enacting R.I. Gen. Laws § 2-1-14, (repealed effective 1993, *see* 1992 R.I. Pub. Laws ch. 133, art. 14, § 3)). Uses were restricted to activity that would not be detrimental to the salt marsh. *Id.* § 1 (enacting R.I. Gen. Laws § 2-1-13). The legislature also enacted the "Intertidal Salt Marshes Act," subjecting to criminal penalties any person who "dumps or deposits mud, dirt, or rubbish upon, or who excavates and disturbs the ecology of, intertidal salt marshes or any part of one, without first obtaining a permit." 1965 R.I. Pub. Laws ch. 26, § 1 (paragraph enacting R.I. Gen. Laws § 11-46.1-1).

Even in 1965, coastal regulation was not new to Rhode Island. Enactments dating back to 1876 (and supplanted by the Coastal Council enabling act only in 1971) controlled and managed "the public tide-waters." 1876 R.I. Acts & Resolves ch. 556, §§ 3-4, 7. *See also, e.g.*, R.I. Gen. Laws ch. 118, §§ 3-6, 10-12, 14 (1896); 1918 R.I. Pub. Laws ch. 1669, § 2; 1935 R.I. Pub. Laws ch. 2250, §§ 60, 64; 1939 R.I. Pub. Laws ch. 660, §§ 100, 101.

---

[22] These functions were transferred to the Department of Natural Resources in 1965, *see* 1965 R.I. Pub. Laws ch. 137, § 1, and the Department of Natural Resources was renamed the Department of Environmental Management in 1977. 1977 R.I. Pub. Laws ch. 182, § 2.

Although the administering authority varied in these successive statutes, each granted to the respective agency the authority to permit encroachments into the public tide-waters, and prohibited all filling not so permitted.[23] For example, more than a century ago, the Board of Harbor Commissioners was given the "general care and supervision of all the . . . tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein," R.I. Gen. Laws ch. 118, § 10 (1896), including "the depositing of mud, dirt, and other substances" into the public tide-waters, *id.* §11, and any such unauthorized encroachment upon the public tide waters was "deemed to be a public nuisance." *Id.* § 14. "Tide-waters" included "flats," *id.* § 7, as well as open water areas. *Cf.* R.I. Gen. Laws ch. 112, §§ 1, 8-11, 13 (1938), RA 1-3.

Nor did this type of control originate with the advent of the Board of Harbor Commissioners in 1876. Authority over lands lying below the mean high tide line had been actively exercised by the State (or colony) from its earliest settlement.[24] The ultimate foundation of the State's authority over tide-waters is the long

[23] *Dawson v. Broome*, 53 A. 151, 152 (R.I. 1902), chronicles an applicant's request for permission to fill tidal wetlands.

[24] *See generally* Dennis W. Nixon, *Evolution of Public and Private Rights to Rhode Island's Shore*, 24 Suffolk U.L. Rev. 313, 313 (1990) ("From the earliest days of the Colony of Rhode Island and Providence Plantations, the shore has maintained this unique legal status, with colonial and now state officials charged with balancing the rights of the public and private property owners."); Joseph K. Angell, *A Treatise on the Right of Property in Tide Waters and in the Soil and Shores Thereof* 162 (photo. reprint 1983) (1826).

established principle of Rhode Island law that the State holds a fee interest in such lands. *See Dawson*, 53 A. at 156, 157.

IV. OWNERSHIP AND DEVELOPMENT OF THE PARCEL

Palazzolo became owner of the site in 1978. The parcel was owned before then by Shore Gardens, Inc. ("SGI"), which acquired the property in 1959.[25] Almost immediately, SGI recorded with the Town of Westerly a subdivision plat representing eighty individual lots, some of these platted "under the waters of Winnapaug Pond." PA A-3. SGI sold off eleven lots, in six transactions, yielding at least three or four fully built residences.[26] "These [developed] lots were apparently in the upland area of the parcel and could be built upon with little alteration to the land." PA A-2. In 1969, SGI reacquired five of the eleven lots previously deeded out. *Id.* Palazzolo succeeded in ownership to all of SGI's remaining properties in 1978.

V. APPLICATIONS WITH RESPECT TO THE PARCEL

A. The "Harbors & Rivers" Applications

In 1962, 1963, and 1966, SGI made three separate applications to the State Division of Harbors and Rivers for its assent to filling what is now the Palazzolo site.

[25] Palazzolo now concedes that he did not become the "owner" of the property under state law until SGI's corporate charter was revoked in 1978. *See* Pet. Br. 5, 23, 24, 43, 48.

[26] The trial court stated that Palazzolo "sold six parcels to various parties who constructed homes on them." PA B-2. Palazzolo admits to "three or four at least." JA 79.

Tr. 60-61, 124, 182-83. The 1962 and 1963 SGI applications contemplated a general filling of the entire wetlands section of the parcel. *See* Application of March 29, 1962, Ex. M, Tr. 191-93, 196; Application of May 16, 1963, Ex. 14, Tr. 142-43. The earlier SGI application proposed off-shore dredging in the open waters of Winnapaug Pond for the fill material, *see* Ex. M, Tr. 191-93, 196, while the second proposed dredging much closer to shore, if not completely within the marshlands themselves. *See* 1963 Application Ex. 14, Tr. 142-43. The 1966 SGI application contemplated filling in the area closest to Winnapaug Pond for the purported purpose of establishing a beach.[27] Application of April 29, 1966, Ex. 14, Tr. 142-43. The state Department of Natural Resources originally assented to, then, based on their adverse impacts, denied these applications on November 17, 1971. *See* Ex. 14, Tr. 142-43. The Army Corps of Engineers followed suit with respect to SGI's parallel application for a federal permit on November 23, 1971, based largely on adverse environmental impacts. *See* RA 47.

B. The Coastal Council Applications

Palazzolo made two applications to fill the property. These are the subject of this dispute. The 1983 application sought permission to construct a bulkhead on the shore of the pond and to fill the entire eighteen-acre wetlands portion of the parcel. *See* JL1, tab 5; *see also* Tr. 144; Tr. of Hr'g Regarding Coastal Council Applic. File No. 83-3-55 (Aug. 18, 1983), at 23, Ex. DD, Tr. 443-44. The application did not seek to alter the

[27] During this time period, the matter took a brief detour to the Rhode Island Superior Court. *See Palazzolo v. Lees*, RA 6-8.

upland areas,[28] and did not state any purpose for the filling.[29]

The 1983 application, "nearly identical to the application submitted in 1963," PA A-5, was rejected by the Coastal Council. JA 18. A 1985 application to fill the marsh for a beach club, "nearly identical to the 1966 application," PA A-5, was denied by the Coastal Council. *See* JA 24. Palazzolo appealed this denial pursuant to the state administrative procedures act, R.I. Gen. Laws §§ 42-35-1 to 42-35-18 (1984 Reenactment & Supp. 1986), and that appeal was denied by the Superior Court. JA 31-42.

[28] At the administrative hearing Palazzolo testified:

> Q. No doubt you propose to sell those lots?
> A. No, . . . you saic that.
> Q. And you don't propose to sell lots off this subdivision?
> A. Not necessarily.
> Q. Do you propose to build on this property?
> A. Not necessarily.
> Q. What is the purpose of filling it, then?
> A. Because it's my right to do if I want to to [sic] look at it it [sic] is my business.
> . . .
> Q. Do you know whether it would pass a perk test [a percolation test necessary for septic tanks]?
> A. It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that.

JA 11, RA 24. Thus, "the Council just had a vague notion that Palazzolo wanted to fill the area." JA 63.

[29] The application said "proposal to restore property line, protect and prevent further erosion, to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations." JL1, tab 5.

C. Development Potential

1. Buildable upland. There was uncontradicted testimony, accepted by both courts below, that a particular portion of the parcel would have been approved as "at least" a single home-site, PA A-11; PA B-11, with a value (as of 1986) close to $200,000. PA A-13; PA B-9. Moreover, the State's appraisal expert showed that this would have netted greater proceeds, at less risk, than the $55,000 to be realistically hoped for by attempting the expensive and uncertain process of filling and subdividing.[30]

2. Possibility of approval for more. The record shows that another upland area on the parcel might also have been amenable to development with a variance as well. Test. of Council Director Fugate, RA 36-39; Test. of Engineer Clarke, RA 42; supported by maps in evidence showing a rise, see Ex. AA, Tr. 471-72, and high elevations in the area, see Ex. EEE, Tr. 650-51. It remains unclear how many lots the Coastal Council would have approved if Palazzolo had submitted a proper application incorporating the upland sections of his parcel.

VI. THE DECISIONS BELOW

In the 1980s, Palazzolo filed two separate civil actions challenging the State's denials. First, Palazzolo

---

[30] *Compare* Test. of Appraiser Andolfo, JA. 101, appraising Palazzolo's parcel for subdivision purposes at $55,000 *with* Test. of Appraiser Andolfo, JA 103-04, appraising Palazzolo's parcel for single house purposes at $194,000. This testimony leaves no doubt that the appraisal and the court decisions crediting that appraisal were based on the underlying value of the parcel—*not*, as intimated by Palazzolo, *see* Pet. Br. 38, 40-41, the gross sale price of the house once built.

appealed under the State administrative procedures act resulting in a superior court decision upholding the agency. JA 31-42. Next, Palazzolo brought the instant takings claim in two successive complaints.

A. Superior Court. Presented with Palazzolo's seventy-four-unit residential development scheme, the trial court found that the filling and septic contamination resulting from the plan would constitute a public nuisance, PA B-11, and further ruled that the home-site's land value of $200,000 in 1986 dollars provided "beneficial use of the subject property." PA B-10, *see also* PA B-12 ("plaintiff has not lost all or even a substantial use of the subject property"). Although Palazzolo proceeded solely under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the superior court also found that Palazzolo did not meet the "investment-backed expectations test" of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), due to pervasive wetlands regulation known to him when he acquired the property. PA B-12.

B. Supreme Court. The Rhode Island Supreme Court held Palazzolo's claim lacked ripeness because he had failed ever to explore the possibility of developing the upland portions of his parcel. PA A-11. Although the court deemed its ripeness ruling "dispositive of the case," the court also "briefly" discussed the merits. PA A-12. The court explicitly endorsed the finding that the property retained economically viable use, noting that "*at least* one single-family home" could be built. PA A-11 (emphasis supplied). The court found Palazzolo's denominator assertion -- that the seventy-four-lot proposal would

yield $3,150,000 -- to be "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic." PA A-13 n.7. The decision was silent on the trial court's nuisance finding. The court also upheld the finding that Palazzolo's knowledge of the regulatory limitations on his property deprived him of *Penn Central*'s "reasonable investment-backed expectations" for such a development scheme. PA A-18.

SUMMARY OF ARGUMENT

Palazzolo's regulatory takings claim suffers from a multiplicity of dispositive defects. The Rhode Island Supreme Court correctly held that his complaint lacks ripeness on two separate grounds, and accurately explained why, even if ripe, Palazzolo had failed to prove a valid takings claim under this Court's decisions in *Lucas* or *Penn Central*. Moreover, the trial judge's undisturbed finding, not addressed by the Rhode Island Supreme Court, that Palazzolo's development proposal would have constituted a public nuisance, and the existence of other similarly dispositive defenses raised by the State below but not reached by the courts (*i.e.*, state public trust doctrine), confirm the justness and correctness of the judgment of the state courts.

1. Palazzolo's as-applied takings claim lacks ripeness. The minimum requirement for an as-applied takings claim is a "meaningful application" for development that provides the relevant governmental authority with a record for determining both the extent to which development is permitted and the site-specific reasons why any further development would be barred under existing law. *See MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986). Palazzolo's

evasive, vague, incomplete, redundant, and grandiose applications fall far short of that standard. He has created a record that leaves unexplored the full extent of residential development permissible on his entire parcel, and that fails to establish the economic viability of the uses that he claims he was denied. Indeed, never before in the annals of this Court's takings law has a landowner demanded compensation for the government's denial of an application to engage in an activity that was not the subject of his claim for just compensation.

2. Equally lacking in merit is Palazzolo's claim that he has been denied all "economically viable use" of his property, within the meaning of this Court's *per se* takings test set forth in *Lucas*. The undisputed factual finding of the lower courts is that Palazzolo's parcel retains substantial economic value for residential use of at least $200,000. *See* PA A-12 to 13; PA B-5, B-9. Palazzolo failed to make the applications necessary to determine whether additional upland areas within his parcel may be susceptible to residential development, so the lower courts' judgment is very conservative. The state supreme court also correctly disputed Palazzolo's exaggerated allegations of lost profits of $3,150,000, which were wholly untethered to any realistic assessment of the actual costs of developing the parcel in the manner he proposed. *See* PA A-13 n.7. For that same reason, Palazzolo has failed to establish that any of the specific uses he was denied were themselves "economically viable."

3. The Rhode Island Supreme Court correctly concluded that when Palazzolo acquired the parcel in 1978, an absolute "right to fill wetlands was not part of the title he acquired." PA A-15. Any such inherent

right to fill coastal marshland property is denied by background principles of state law, as expressed in Rhode Island's comprehensive Coastal Resources Management Program ("CRMP"), longstanding common law and constitutional principles regarding public rights in tidal areas, and a series of antecedent regulatory programs. For this reason, Rhode Island's restrictions on Palazzolo's development would not be a taking under *Lucas* even if they had deprived him of all economically viable use of his property.

4. Finally, Palazzolo's newly-discovered reliance on *Penn Central* is misplaced. Not only did Palazzolo fail to raise this argument in the lower courts, but the state courts also correctly explained why, in all events, any such argument would lack merit. Palazzolo lacks the "interference with reasonable investment-backed expectations" needed to sustain such a takings claim. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). When Palazzolo acquired his property in 1978, he could not possibly have harbored any reasonable expectation that he could develop the property in the manner he subsequently proposed. Not only did the pre-existing law clearly and precisely bar massive filling activities for such purposes, but the State had previously denied virtually identical applications filed by a preceding owner with which Palazzolo was closely affiliated.

ARGUMENT

I. PALAZZOLO'S AS-APPLIED REGULATORY TAKINGS CLAIM WAS NOT RIPE

The threshold premise of Palazzolo's claim of state court error in its ruling is his contention that "'[t]he

type and intensity of development legally permitted' on [his] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 11 (citation omitted). Palazzolo's premise is simply wrong. Although Palazzolo and affiliated entities have made multiple applications to fill coastal wetlands portions of his parcel, *see* Argument I.C., *infra*, the intensity of legally permitted development on his parcel is *not* known, let alone "perfectly clear." The failure to file a true and meaningful application[31] is what has compromised this record. The faults in Palazzolo's applications are that they (1) do not ask for permission to build the project he claims he was denied (and thereby evade state procedures and omit essential information), (2) do not contemplate the "whole parcel" of his land, and (3) are redundant and grandiose.

A. Palazzolo Failed to Apply for the Subdivision Proposal He Claims to Have Been Denied

Palazzolo failed to ripen his claim by deliberately obscuring the reasons why he sought to fill the coastal wetlands on his parcel. The applications for

---

[31] To be "meaningful an application . . . must be essentially complete, must realistically describe the desired use, and must be reasonably current." *Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991). *See, e.g., S. Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 504 (9th Cir. 1990) (a property owner must give "indication . . . of how [it] might intend to develop the property if permitted to do so."); *Unity Ventures v. County of Lake*, 841 F.2d 770, 776 (7th Cir. 1988) ("a formal application . . . with adequate documentation about the density of the proposed development."). *See also MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 352 n.8 (1986) ("The implication is not that future applications would be futile, but that a meaningful application has not yet been made.").

development made by Palazzolo presumed no residential development at all. The first (1983) application was just for permission to fill the entire eighteen-acre wetland of parcel with fill. JA 10. At the Coastal Council, Palazzolo specifically denied any intent to try to construct the very seventy-four-unit residential development that is now the basis of his takings claim. *See* n. 28, *supra*. The second (1985) application was to fill most of the wetland (approximately twelve acres) for what was vaguely described as a project to construct a "beach." JA 25.

Hiding his purpose allowed Palazzolo to achieve four strategic advantages. First, Palazzolo dodged the necessary applications for ISDS and other permits required by state law prior to seeking the Coastal Council's permission to fill the coastal wetlands on his parcel. The permit process for septic systems in coastal wetlands would have clarified the costs of constructing the necessary septic systems (sharply contested at trial, JA 51-55) and removed any lingering doubt as to the "grandiose," PA A-11, "speculative," PA A-13, and "unrealistically optimistic," PA A-13 n.7, nature of his subdivision proposal. Second, an administrative record on sewage would have allowed even better documentation of the adverse environmental spillover effects, such as the effects which led to the trial court's undisturbed finding that the proposal would constitute a "public nuisance." PA B-11. Palazzolo would be hard pressed to allege a taking for a permit denial based on sewage hazard to public waters and public health. *See Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926) (no property right exists to discharge sewage into public waters). Third, not seeking permission for the subdivision allowed him to

finesse the "public trust" issue of on whose land he was actually proposing to build. *See* nn. 59, 60, *infra*. Fourth, by leaving the uplands out of his application, but retaining them in the proposal that he claims as his value, Palazzolo is able to imply that the uplands themselves have adequate economic value only as part of a seventy-four lot parcel-wide subdivision scheme. Argument I.B, *infra*. (Here the "whole parcel," *id.*, and "meaningful application" problems converge.)

This maneuver also allowed Palazzolo to claim in the lower courts, and before this Court, "lost value" of $3.15 million, Pet. Br. 41, that is fanciful and unfounded.[32] Now Palazzolo characterizes his takings claim as relying only on the denial of the 1985 "beach" application and not on the 1983 application at all. Pet. Br. 8 n.3-4, 15 n.7. However, in the lower courts, the only subject of his claim of economic deprivation was his plan to fill the entire eighteen acres for an intensive residential subdivision development,[33] and it remains

---

[32] Palazzolo's assertion of a $3,150,000 value to his development scheme is close to imaginary. No one outside his litigation team has ever given it any credence whatsoever. It was found by the Rhode Island Supreme Court to be grandiose, speculative and unrealistically optimistic, Statement of the Case VI.B, *supra*; the superior court thought so little of the $3,150,000 price tag that it ignored it outright; the government's witness found the project a "great folly," Test. of Appraiser Andolfo, JA 101; much of it would be constructed on state land, *see* nn. 59, 60 & public trust discussion in text, *infra*; its numerous assumptions, *see* JL1, tab 7, 22-23 are untested by the refiner's fire of a true application process, and there is no reason to believe it would have received necessary federal approvals. *See* n. 21, *supra*.

[33] *See, e.g.*, Test. of Palazzolo, RA 81 (Q. "But your claim [of a taking] before this Court today is based on residences and not a beach club, isn't that correct? A. Correct.").

the central basis of his financial allegations before this Court. Palazzolo has made no record whatsoever as to any economic value of the "beach."[34]

It does not seem unreasonable for the Rhode Island Supreme Court to require that Palazzolo must have at least applied for the development that serves as the subject of his as-applied takings claim. [35]

---

[34] Nor is this surprising. As described by a government expert witness at trial, that proposal suffered from a total lack of practical purpose and logical link to the amount of contemplated fill. *See* Test. of Engineer Clarke, Tr. 650 ("[I]n order to get into the water, you'd have to walk across the gravel fill, but then work your way through approximately 70, 75 feet of marsh land or conservation grasses to get to the water. And that's why I call it a so-called beach, because I have never experienced that on a beach before."). With the natural seashore of Misquamicut Beach across the road, this hardly seems like much of an attraction, and Palazzolo has never argued it had economic viability. The filling alone would likely cost in the millions of dollars. JL1, tab 9.

[35] Rhode Island courts are not ordinarily confined to ripeness rules developed by this Court, whether constitutional or prudential in derivation. This Court's Article III precedent is controlling only in federal court and cannot compel the assertion of jurisdiction by state courts. *See* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 Wis. L. Rev. 39, 135-70. *Cf. Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977) ("Illinois may choose to close its courts", suggesting that state and federal judiciaries operate independently in fashioning such rules). Nor did the Rhode Island court limit its analysis to this Court's precedent and federal law. The court repeatedly relied on its own state supreme court precedent in several respects, stressing "the principle that th[e] Court 'will not render advisory opinions or function in the abstract.'" PA A-9 (quoting *R.I. Ophthalmological Soc'y v. Cannon*, 317 A.2d 124, 130-31 (R.I. 1974)). The court further relied on Palazzolo's failure to comply with state administrative law requirements. PA A-12 n.6.

B. Palazzolo's Applications Exclude His Whole Parcel's Valuable, Dry Upland Areas

"The relevant question . . . is whether the property taken is all, or only a portion of the parcel in question." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644 (1993). Palazzolo's applications only address the wetlands portion of his site.[36] *See* JL1, tab 5 (1983 application); Ex. 8, Tr. 67, 330-31 (1985 application). His parcel does not consist only of coastal wetlands, but upland areas as well, and the state wetlands restrictions complained of do *not*

---

[36] Palazzolo's 1983 application to the Coastal Council was clearly limited to the alteration (filling) of the wetland portion of his parcel. *See* 1983 Application, JL1, tab 5 ("proposal to restore property line, protect and prevent further erosion [&] to fill property to elvation [sic] 6.5 Ft., to prepare property for use as designated by zoning regulations"). As this application makes no reference to the construction of any "residential buildings . . . for human habitation," CRMP § 300.3, Palazzolo limited the Council's scope of review to a request for approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters" (requiring a water quality certification from the Department of Environmental Management and assent from the Army Corps of Engineers as a prerequisite to receiving the Coastal Council's permission to fill below the mean high water mark). Again, Palazzolo's 1985 application was limited to the depositing of fill in the wetland portion of his parcel. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("To place . . . fill . . . to establish a private beach club."). For the same reasons as above, Palazzolo necessarily was seeking approval under § 300.10. *See* CRMP § 300.10, "Filling in Tidal Waters." Palazzolo specifically was not seeking approval for any proposed activity with respect to the upland portion of his land. *See* 1985 Application, Ex. 8, Tr. 67, 330-31 ("There will be no filling of the existing high areas (roadway and small island to the west side of the area.)").

prevent building on upland portions of his parcel.[37] Not only does Palazzolo fail to encompass the whole parcel, but its limit to his highly-regulated wetlands suggests strategic behavior.[38]

Palazzolo made two applications to fill all or substantially all of his coastal wetlands, yet we still do not know the extent of upland, dry portions of his property.[39] Palazzolo acknowledges that at least one portion of his property includes upland, allowing him to build "one single-family home." Pet. Br. 14-15, 18. The record is not sufficient to support Palazzolo's further contention that the Coastal Council would permit "one single-family home and nothing more." Pet. Br. 13. The Supreme Court left open the possibility of more. PA A-11 ("at least" one single family home). Trial court testimony revealed that there might be additional upland portions on Palazzolo's eighteen

---

[37] *See* Statement of the Case III.B.1.

[38] *See Tabb Lakes, Ltd., v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) (limiting quantum of land considered to be wetlands creates "ipso facto" taking).

[39] The wetland boundary of Palazzolo's site is also obscure; there is "a substantial amount of land" under the waters of Winnapaug Pond, PA A-3, and "additional land is subject to daily tidal inundation and ponding." *Id.* Indeed, the record strongly suggests that the majority of the acreage is below the mean high water mark. JL2, item 1 (showing elevations; all elevations below 1.72 are below mean high tide line). *See also* n.9, *supra*. Mean high water mark is significant both because it is indicative of the aquatic nature of the property -- and therefore the adverse spillover effects associated with its development -- and because it means that Palazzolo's title in the property is limited by state ownership. *See* nn. 59, 60, *infra*.

acres that would support three or four additional lots.[40] Indeed, the State even proposed an offer of judgment at trial based on testimony suggesting that as many as eight of the lots on the parcel contained developable uplands. *See* Tr. 209-10, 258-60.

What the Coastal Council would conclude if it had an application that allowed it to consider upland portions of the acreage is not, of course, clear. But the very purpose of the judicial ripeness requirement is to allow for those determinations to be made in the first instance by the regulatory agency and not based on judicial speculation. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 190-191 (1985).

C. Palazzolo's Filings Were "Exceedingly Grandiose" and Redundant

"[R]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 353 n.9 (1986). Despite Palazzolo's suggestions that he has exhausted himself in applications to the point of

---

[40] Government witnesses at trial testified both to the possibility of further upland portions of the property for which a "special exception" was not required for residential development, and to how Palazzolo's lack of a survey for that purpose precluded the Coastal Council from knowing for sure. *See, e.g.*, Test. of Council Director Fugate, RA 36 ("There may, and again, because we don't have an accurate or detailed survey, there may be other upland portions that are immediately adjacent to Atlantic Avenue, but that can't be determined."); Tr. 209 ("there may be other upland areas on the backside of those houses along Atlantic Avenue that might have sufficient upland. . . ."); Test. of Engineer Clarke, RA 42, 44 ("the site has two upland areas" and "realistic to apply for those locations").

futility, in point of fact he applied only for his "beach" and "erosion control," hiding the seventy-four-lot subdivision proposal. Even though Palazzolo never applied for any intermediate use, and even though he avoided any application including his buildable uplands, nevertheless, the record we have just discussed supports the likelihood of some less grandiose beneficial use. Before the possibility of some intermediate use is ruled out, applicants should meet some burden of coming forward in good faith, candidly disclosing their intentions, and using the whole parcel of their property.[41]

To the extent that Palazzolo references or relies on SGI's applications from the 1960s, they add little to his case, having been found to be "nearly identical" with his 1980s applications. Statement of the Case ("Statement") V.B, *supra*. As found by the courts below, the application denials predating his ownership of the property are not proof of futility, but of dramatically inhibited reasonable investment-backed expectations. *See* PA B-12 ("he knew"); PA A-18 ("he had no reasonable investment-backed expectations that he could develop a 74-lot subdivision"); *See* Argument IV, *infra*. Under *Lucas*, since the state supreme court "rested its judgment on ripeness grounds," *Lucas*, 505 U.S. at 1011, the fact that *Palazzolo* "may yet be able to secure permission to build on his property," *id.*, should "preclude review." *Id.*

---

[41] The paucity of the record is due to the applicant's stratagems, and should not be held against the State, lest strategic filing behavior be encouraged. This problem is emerging since *Lucas*. *See, e.g., Forest Properties, Inc. v. United States*, 39 Fed. Cl. 56, 72-75 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir.), *cert. denied sub nom. RCK Properties, Inc. v. United States*, 528 U.S. 951 (1999).

Our final observation on ripeness is that a court is entitled to congruity[42] between the issue presented on the merits and the issue presented for ripeness determination. If an applicant drastically narrows his argument to achieve a "ripe" question (for instance that mere refusal to allow him to fill wetlands is a taking),[43] that is the question he should address on the merits. Palazzolo tries to fly in under the ripeness radar with just such a narrow claim, and then once in, implicate numerous unripe issues. He cannot have it both ways.

II. PALAZZOLO'S CLAIM THAT HE HAS BEEN DENIED ALL "ECONOMICALLY VIABLE USE" OF HIS PARCEL LACKS MERIT

Palazzolo's sole argument to the courts below was that the Coastal Council's denial amounted to a *per se*

---

[42] For this same reason, Palazzolo's reliance *see* Pet. Br. 18, on the Texas Supreme Court's decision in *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) is misplaced. In that case, the landowner's application coincided with his claim of value, and his ripeness question and his question on the merits converged "[b]ecause the proper owners in *Mayhew* were willing in essence to concede that permission for less intensive development might be granted, while at the same time denying that such permission would avert a regulatory taking." Pet. 17. (emphasis removed). Palazzolo makes no such concession and cannot similarly claim ripeness.

[43] To the extent Palazzolo hints at a facial challenge to Rhode Island's Coastal Resources Management Plan, he would run squarely into a "rational basis" for the protection of coastal wetlands under the Due Process Clause, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938), and a substantial advancement of legitimate state interests under *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

taking under *Lucas*.[44] Palazzolo, however, cannot establish what *Lucas* requires: that the Coastal Council deprived him of all "economically viable use of his land." 505 U.S. at 1016. First, he cannot show that there is no economically viable use remaining. The parcel was bought for a "total initial investment of $13,000," PA B-12,[45] has a minimum permitted value of $200,000 in 1986 dollars, PA B-5; PA A-12 to A-13, and may be amenable to further development. Statement V.C. That is not an elimination of all (or nearly all) value. Second, Palazzolo cannot show that his proposed uses were themselves "economically viable." Argument II.B, *infra*. A governmental agency cannot be fairly deemed to have denied a landowner

---

[44] Plaintiff's Post-Trial Mem. 6 ("This Court need not look beyond the *Lucas* case"); Br. of Appellant 5 (same). There are some key factual differences from *Lucas* Lucas 's property went from $975,000 to "valueless," *Lucas*, 505 U.S. at 1006, 1007; Palazzolo's from $13,000 to at least $200,000. PA B-12, B-5. Lucas's regulation was imposed after acquisition, 505 U.S. at 1008; Palazzolo's pre-existed his acquisition of the parcel. Statement III.B, IV, *supra*. Lucas's proposed use was a single-family residence, "what the owners of immediately adjacent parcels had already done," 505 U.S. at 1008; Palazzolo proposes an unprecedented incursion on the pond he and his neighbors share to install a seventy-four-lot subdivision. *See* n.7, *supra*.

[45] The record is once again less than crystal clear on this point, and once again Palazzolo is to blame. By only advancing a *Lucas* argument below, he avoided *Penn Central*'s "economic impact" analysis and the relevant record as to his investment and return. We know that SGI owned the property at the times of the investment of $13,000, and sold off a number of lots, but the amount of the sales was never made a matter of record, and so the "total initial investment" calculated by the Superior Court did not offset any profits from lots sold. PA B-12.

economically viable use if the use denied is not economically viable in the first instance.[46]

A. Palazzolo's Parcel Retains Substantial Economic Value for Residential Use

In *Lucas*, this Court announced a *per se* regulatory takings test applicable only in extreme and "relatively rare" circumstances, 505 U.S. at 1018, when the government by regulation "denies an owner economically viable use of his land." *Id.* at 1016 (citation and internal quotation marks omitted). The Court concluded that only "deprivation of *all* economically feasible use" is the constitutional equivalent of a physical appropriation of the property by the government. *Id.* at 1017 (emphasis supplied). "[W]hen the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his parcel economically idle, he has suffered a taking." *Id.* at 1019 (emphasis supplied).[47] This accorded with earlier

---

[46] Non-viable uses should be a rarity, were it not for the incentive takings litigation provides landowners to engage in strategic behavior to manufacture a "taking." This problem dissipates when the proposed use is put through the refiner's fire of a true and meaningful development application for the whole parcel.

[47] The Court in *Lucas* specifically accepted the "all-or-nothing" character of the *per se* categorical takings test being adopted, 505 U.S. at 1019 n.8 ("[i]t is true that in at least some cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full"), noting that the *Lucas* "categorical formulation" does not preclude a landowner from seeking to establish a taking under a different analysis, such as the multi-factor approach in *Penn Central*. Palazzolo expressly disavowed in the lower courts any reliance on any takings test other than the *Lucas per se* test. *See* note 44, *infra*.

language that regulation can be a taking only when it "totally destroys the economic value of property." *Pennell v. City of San Jose*, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part).

By Palazzolo's own acknowledgment, he can make economically viable use of his parcel. Pet. Br. 13. "[T]he uncontradicted evidence was that [the Coastal Council] . . . *would not* deny [Palazzolo] permission to build one single-family home" on his parcel. *Id.* (emphasis in original). This is certainly "one step short of a complete deprivation" of use, *Lucas*, 505 U.S. at 1019 n.8, indeed, a long step short.

Because of the ripeness problems, *supra*, the record can only suggest that the Coastal Council may permit as many as three or four more upland lots. *See* Argument I.B, *supra*. Having never formally pursued or been denied upland development, Palazzolo cannot fairly contend before this Court that it has been "taken." We have already discussed the "undisputed evidence . . . that had [Palazzolo] developed the upland portion of the site, its value would have been $200,000," PA A-12 to A-13; PA B-5 (trial court finding), and that this was a minimum value for the parcel. PA A-11 ("at least" one home site). It is this Court's long-established practice not to disturb such factual findings when upheld by both lower courts[48] and there is no reason here to doubt the validity of their findings. Whatever the upper limits of economically "productive,"

---

[48] *See, e.g., NCAA v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 97 n.15 (1984); *Rogers v. Lane*, 458 U.S. 613, 623 (1982); *United States v. Dickinson*, 331 U.S. 745, 751 (1947); *United States v. Commercial Credit Co.*, 286 U.S. 63, 67 (1932); *United States v. Chem. Found.*, 272 U.S. 1, 14 (1926); *Baker v. Schofield*, 243 U.S. 114, 118 (1917); *Towson v. Moore*, 173 U.S. 17, 24 (1899).

"beneficial," or "viable" use of Palazzolo's whole parcel may be, there is no serious issue that at least some residential development, possessing substantial value, would be permitted.[49]

To the extent the Court wishes to assess value in terms of a ratio rather than an absolute number, it should consider the problems with Palazzolo's improbable "denominator" of $3,150,000. *See* n.32, *supra*; n.50, *infra*. It may also wish to consider his "total initial investment" in this property of $13,000. PA B-12.

B. Palazzolo Failed to Establish That His Development Uses Were Themselves "Economically Viable"

As we have shown, Argument I.A; nn.32, 34 *supra*, there is also no plausible record to support that Palazzolo's speculative development proposals were "economically viable." The government's appraisal expert ultimately concluded that Palazzolo would have to expend "in excess of four million dollars in construction costs"[50] for a "net overall value of

---

[49] Contrary to Palazzolo's characterization of the decision of the state supreme court, Pet. Br. 38-41, that court never intimated that so long as the parcel retains some market value above zero, it necessarily possesses economically viable use. The issue presented to the court in this case was whether use of the parcel, which would give the parcel at least a value of $200,000 (as of 1986), was a *Lucas per se* taking. The state supreme court nowhere intimated that it was assuming that Palazzolo could only receive some nominal value above zero.

[50] Government experts described the scope of the task of filling in approximately eighteen acres of coastal marshland with eight feet of fill. *See* Test. of Engineer Clarke, Tr. 554, 594-99; *see also* Preparation and Development Costs, JL1, tabs 9-10. With so much

$55,000." JA 101. In what must be deemed an understatement, he described such an undertaking as a "great folly." JA 101. The "beach" proposal fares no better. *See* n.34 & accompanying text, *supra*. In short, no agency or court in these proceedings has ever given the economic viability of Palazzolo's projects the slightest credence, and the record underlying the judicial skepticism is equally damning.

Because Palazzolo has neither established that his property is valueless under the regulations, nor established an economically viable proposal, his claim lacks merit.

III. PALAZZOLO'S CLAIMS ARE BARRED BY RESTRICTIONS THAT PREDATE HIS ACQUISITION

Under *Lucas*, even a regulation that deprives a landowner of all economically viable use is not unconstitutional "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. This Court further stated, "[a]ny limitation so severe cannot be newly

---

acreage below mean high water mark, the construction would have required at least 250,000 cubic yards of fill and the dredging out over 60,000 cubic yards of existing muck. *See* Test. of Engineer Clarke, Tr. 554, 594-599; *see also* Test. of Engineer Caito, Tr. 264, 274-77, 279-81. The engineering and appraisal experts considered the feasibility of various septic systems, the limitations imposed by local zoning laws, the requirement that construction, for the most part, would have to be on stilts, the type of infrastructure needed, and market prices prevailing at the time. *See* Test. of Engineer Clarke, Tr. 554, 562-77, 603, 606; Test. of Appraiser Andolfo, Tr. 661, 667-73; JL1, tabs 9 and 10.

legislated or decreed (without compensation) but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id.* at 1029.

The Supreme Court of Rhode Island affirmed the trial court's finding that "the right to fill the wetlands was not part of Palazzolo's estate to begin with," PA A-13, and itself found that "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." PA A-15. This is a state law determination entitled to this Court's respect. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) (constitutional property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law"). This determination is also well-founded.

A. Antecedent "Background Principles of State Law" Are Significant Under *Lucas*

Sequence matters. This Court's opinion in *Lucas* referred to limitations on land use that were "*newly* legislated or decreed," 505 U.S. at 1029 (emphasis supplied). (In *Lucas* the acquisition of the property preceded the regulation applied.) *Lucas* distinguished between regulatory action that does and does not "proscribe a productive use that was *previously* permissible under relevant property and nuisance principles." *Id.* at 1029-30 (emphasis supplied). Indeed, the very term "background" in "background principles" has an obvious temporal element, by

focusing on those "social, historical, and other *antecedents* . . . of an event or experience." *Random House Webster's Unabridged Dictionary* 151 (2d ed. 1997) (emphasis supplied). Thus, as an opening proposition, the Rhode Island Supreme Court was plainly correct in rejecting Palazzolo's "argument that the time of acquisition is irrelevant" to regulatory takings analysis. PA A-16.[51] As this Court expressly acknowledged in *Lucas*, common law principles may, "because of changed circumstances or new knowledge . . . make what was previously permissible no longer so." 505 U.S. at 1031 (quoting Restatement (Second) Torts § 827 cmt. g).

Palazzolo's contrary view is based on an erroneous and extreme image of property.[52] According to

[51] Palazzolo wrongly posits, Pet. Br. 22-23, that this Court in *Nollan v. California Coastal Comm'n.*, 483 U.S. 825, 833 n.2 (1987), previously ruled that the timing of an individual's acquisition of property is wholly irrelevant to the "background principles" of law inquiry under *Lucas*. The Court in *Nollan*, however, cannot be fairly deemed to have answered a legal issue not posed until *Lucas* five years later. The Court's rationale in *Nollan* arose from circumstances where the government, by permit exaction, sought to appropriate a permanent easement for the public across the landowner's beachfront property, which the Court deemed the legal equivalent of the government's "permanent physical occupation" of the land. *Nollan*, 483 U.S. at 832. The *Lucas* Court answered the question whether notice is relevant by agreeing that an otherwise *per se* taking may be defeated by "background principles." 505 U.S. at 1029. The only remaining issue concerns how those "background principles" are defined, which was an issue not addressed in *Nollan*.

[52] Indeed his absolutist property views are at odds even with Locke, who recognized "Man['s] . . . uncontroleable Liberty, to di[s]po[s]e of his Per[s]on or Po[ss]e[ss]ions," John Locke, *Two Treatises of Government* 168 (photo. reprint 1992) (1698) (spelling

Palazzolo, allowing background principles of law to change over time would be "Antithetical" to the "History and Structure of the Constitution" because government could "Acquire the Right to Use and Develop Property Without Paying Just Compensation."[53] Pet. Br. 24. Palazzolo's fundamental mistake is his assumption that whenever the government *restricts* a landowner from using his parcel in a particular way the government has, in effect,

and capitalization in original except as indicated). Palazzolo's extreme view also sharply diverges from that of Blackstone, who acknowledged that man in his natural state had "the ab[s]olute and uncontroled power of doing whatever he plea[s]es," 1 William Blackstone, *Commentaries on the Laws of England* 121 (photo. reprint 1979) (1765) (spelling in original except as indicated), but also recognized that "every man, when he enters into [s]ociety, gives up a part of his natural liberty, as the price of [s]o valuable a purcha[s]e." *Id.* Indeed, said Blackstone, "the principal aim of [s]ociety is to protect individuals in the enjoyment of tho[s]e ab[s]olute rights . . . which could not be pre[s]erved in peace without . . . [s]ocial communities." *Id.* at 120 (spelling in original except as indicated). *Cf. Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting) ("the advantage of living and doing business in a civilized community").

[53] The history of American law is one of change however. As described by Oliver Wendell Holmes more than a century ago: "The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." Oliver Wendell Holmes, *The Common Law* (1881), *reprinted in* 3 *The Collected Works of Justice Holmes* 115 (Sheldon M. Novick ed., Univ. of Chicago Press 1995). Even the expansion of takings law by Justice Holmes in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1992), beyond "direct appropriation," *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871), would seem to be one such development in constitutional law.

acquired the right to use the property in that same manner itself. That is simply not so.[54]

B. The Relevant "Background Principles of State Law" Under *Lucas* Are Not Confined to Those Supplied By Common Law Doctrine

Lucas leaves ambiguous the extent to which "background principles" must derive from the common law, to the complete exclusion of other

---

[54] Palazzolo's zero-sum, binary proposition that everything he is not permitted to do is necessarily transferred to the State, is inconsistent with law and logic. First, there is a public interest apart from the State's proprietary or governmental interests, as reflected in doctrines such as nuisance, public trust, and rights of the shore that are "background principles" to title in land in Rhode Island. Second, there are situations, exemplified by the "tragedy of the commons," *see* Garrett Hardin, *The Tragedy of the Commons*. 162 Science 1243 (1968), where the State's only interest is as a neutral arbiter of conflicts that nature, and neighbors, present. There is reciprocity of advantage where common amenities are protected (such as, to all of its neighbors, the scenic, recreational and other amenities of Winnapaug Pond), or where "independent pursuit by each decision-maker of its own self interest leads to results that leave all decision-makers worse off." Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196, 1211 (1977) (describing tragedy of the commons). Takings law that did not respect well-settled statutes would disrupt the well-settled and investment-backed expectations of nearby property owners, and at the extreme would require payment for every such limited use. "[W]ere the exerci[s]e of every virtue to be enforced by the propo[s]al of particular rewards, it were impo[ss]ible for any [s]tate to furni[s]h [s]tock enough for [s]o profu[s]e a bounty." 1 William Blackstone, *Commentaries on the Laws of England* 56 (photo. Reprint 1979) (1765) (spelling in original except as indicated). And with so profuse a bounty, who would not bluff their desire to exercise the virtue enforced?

sources of law. Before this Court, Palazzolo apparently contends that the only relevant law is the common law of easements and nuisance.[55] *See* Pet. 6. We disagree. We think the better view is that *Lucas* takings can appropriately be limited by other sources of law, particularly (as here) statutory and regulatory provisions that derive from background common law principles.[56]

Certainly, *Lucas* did not foreclose that background principles extend beyond the common law. The majority did not say that the limitation that "inheres in the title itself" cannot be "legislated," but that it could not be "*newly* legislated." 505 U.S. at 1029 (emphasis supplied). The Court also did not refer just to nuisance law, but to relevant background principles "of the State's law of *property*" as well. *Id.* at 1029 (emphasis

---

[55] Even if the only relevant background principle were nuisance law, the judgment below should still ultimately be affirmed. The trial court held that Palazzolo's proposed use of the property amounted to a common law nuisance under Rhode Island law. *See* PA B-11.

[56] As stated by Justice Kennedy in his concurring opinion in *Lucas*, "[t]he common law of nuisance is too narrow a confine for the exercise of regulatory power in a complex and interdependent society." 505 U.S. at 1035 (Kennedy, J., concurring in the judgment). For instance, some statutory and regulatory schemes codify and otherwise derive from common law principles, to the benefit of property owners, by providing an orderly forum for advance approval of development proposals, rather than requiring applicants to proceed at their own risk of injunction and abatement. To the extent the State enforces common law principles by regulation, property owners further benefit by uniformity and certainty of protection, rather than protection hinging on who has neighbors with the temperament and funds to commence a nuisance, public trust or other common law action.

supplied). Many sources of law may shape and define private property rights. See nn. 59, 60, *infra* (public trust doctrine). Certainly no one could seriously maintain that state law grounded in a state's *constitution*, but not in its common law, was irrelevant to the background principles inquiry. *See, e.g.*, R.I. Const. art. 1, § 17 (rights of fishery and shore).

We have no expression by this Court that legal rules based on the common law are superior to those based on statute. After all, "the great office of statutes is to remedy defects in the common law as they developed, and to adopt it to the changes of time and circumstances." *Munn v. Illinois*, 94 U.S. 113, 134 (1876). *Cf. United States v. Causby*, 326 U.S. 256, 260 (1945) ("It is ancient doctrine that at common law ownership of land extended to the periphery of the universe. . . . But that doctrine has no place in the modern world.").[57]

---

[57] The highest courts of states to address the issue readily agree with the common sense proposition that common law principles cannot be the exclusive source of "background principles" of law relevant under *Lucas*. *See, e.g., Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994); *Soon Duck Kim v. City of New York*, 681 N.E.2d 312, 318 (N.Y. 1997); *Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 718 (S.C. 1999); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 420 (Va. 1998). Even the cases cited by Palazzolo, Pet. Br. 32, do not support his legal theory that the only relevant source for discerning "background principles" is common law doctrine. While those cases do not endorse the notion that all land use restrictions imposed by pre-existing statutes and regulations automatically bar a *Lucas per se* taking, none support Palazzolo's claim that such pre-existing laws are *not* a relevant factor to be considered at all. Indeed, in quoting from the cases, Palazzolo omits the second half of the sentence from the Colorado Supreme Court's opinion in *Cottonwoods Farms v. Bd. of County Comm'rs. of County of Jefferson*, 763 P.2d 551, 555 (Colo. 1988), in which the state court adds that a "majority of courts have held that the fact of prior purchase with knowledge of applicable zoning regulations . .

Statutes build upon and develop the common law based upon the very "changed circumstances or new information" that this Court acknowledged in *Lucas* could be the legitimate basis of changes in the common law itself. 505 U.S. at 1031 (quoting Restatement (Second) of Torts § 827 cmt. g). Most simply put, "[f]or almost a century now, legislators – with judicial acquiescence – have taken over the task of refining and specifying the range of acceptable landowner practices, once defined only by judicially administered trespass and nuisance law on a case-by-case basis." Carol Rose, *A Dozen Propositions on Private Property, Public Rights, and the New Takings Legislation*, 53 Wash. & Lee L. Rev. 265, 281 (1996). Thus, "it is particularly misleading to look simply to common-law judicial definitions of nuisance as the basis for modern property rights." *Id.*

The statutes and regulations at issue illustrate this historical relationship. Long before the Rhode Island legislature enacted the Rhode Island Coastal Resources Management Act of 1971, 1971 R.I. Pub. Laws ch. 279, land use development in the coastal marshes was restricted. *See* Section C, *infra*. The 1971 statute, as supplemented by the Coastal Council's Coastal Resources Management Program, simply implemented those longstanding principles[58] in a comprehensive and

---

. *does constitute a factor* to be considered in evaluating the claims of invalidity" (emphasis supplied). *See also Karam v. N. J. Dep't of Envtl. Prot.*, 705 A.2d 1221, 1229 (N. J. Super. Ct. App. Div. 1998) ("plaintiffs could not have reasonably expected that they would be immune from all changes in the law during that period.").

[58] Palazzolo treats the public purpose of the State's regulations as enhancing his taking claim. The public nature of the State's goals in regulating wetlands cuts in several directions. First, a public purpose is necessary for there to be a compensable taking at all:

consistent fashion. The overlap is plain in this very case: the trial court, found the use Palazzolo claims was taken from him by regulation to be so harmful as to be barred by the state's common law public nuisance doctrine. PA B-11.

C. Under *Lucas*, Background Principles Supplied By State Law Defeat Any Takings Claim

The state supreme court was correct that under Rhode Island law at the time of Palazzolo's purchase "the right to fill wetlands was not part of the title he acquired." PA A-15. The state court properly relied on the comprehensive state coastal management program existing at the time of Palazzolo's acquisition, whose plain terms made clear at that time that state law would bar the massive filling of coastal wetlands he later proposed.

In this case, the constitutional, statutory, and common law pedigree of the state's regulatory program compels the Rhode Island Supreme Court's decision. This is not an instance in which a state has dramatically and suddenly changed law to the frustration of settled expectations of property owners.

---

property cannot be taken except for public purposes. *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (1984); *City of Newport v. Newport Water Corp.*, 189 A. 843, 846 (R.I. 1937). The fact that a taking demands a public purpose does not prove the converse. Indeed, under the *Penn Central* test, public purposes such as preventing harm to the public health and safety will make a regulatory taking *less* likely. *Penn Central*, 438 U.S. at 124. Last, *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980), inquires whether the regulatory regime substantially advances a legitimate state interest. Where it does, the regulation is more likely to withstand a takings challenge. *Id.*

As described *supra* Statement III.B, the 1971 statute applied to Palazzolo's parcel in this case is directly traceable to a series of state statutory programs in existence for decades before then, and is even more deeply rooted in state common law and constitutional principles which, throughout Rhode Island's history, restricted the very kind of injurious fill activities Palazzolo sought to undertake. The extent of these historical restrictions shows that filling of coastal wetlands "has long been the source of public concern and the subject of governmental regulation" in Rhode Island. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

First, and most obviously, the trial court below expressly found that Palazzolo's proposed uses would amount to a nuisance under the common law because of the serious harm from such a development. PA B-10, B-11. Interfering with wetlands is clearly subject to the law of nuisance under Rhode Island law. *See Citizens for Preservation of Waterman Lake v. Davis*, 420 A.2d 53, 59-60 (R.I. 1980). *Cf. Payne & Butler v. Providence Gas Co.*, 77 A. 145, 153 (R.I. 1910) (interference with shellfish beds deemed a nuisance); R.I. Gen. Laws ch. 118 § 14 (1896) (fill in navigable waters subject to law of nuisance). Nuisance uses are not compensable. *Mugler v. Kansas*, 123 U.S. 623, 668-69, 670-71 (1887).

Second, layers of state constitutional and common law dramatically restrict filling and other private rights in tidal wetlands. Rhode Island's constitution protects the public's "right of fishery, and the privileges of the shore." R.I. Const. art. 1 § 17; *see Jackvony v. Powel*, 21 A.2d 554, 554-58 (R.I. 1941); *Clarke v. City of Providence*, 15 A. 763, 765-66 (R.I. 1888). This section was in the state's original 1843 constitution, which incorporated

rights dating back to our Royal Charter of 1663 (granting "our loving subjects . . . liberty . . . upon said coast"). Rhode Island Royal Charter of 1663, *repealed by* R.I. Const. of 1843, *available at* http://www.state.ri.us/rihist/richart.htm. *See also* R.I. Const. art. 1 § 16 (exempting from state takings clause the regulation of tidal wetlands).

These constitutional rights are of such force that the question usually argued is whether the State even has the power under the constitution to authorize private landowners to fill in tidal wetlands. *See, e.g., Jackvony*, 21 A.2d at 556 (public "'rights,' beyond the power of the general assembly to destroy"); *Clarke v. City of Providence*, 15 A. at 764, 765-66. Even in cases where the Rhode Island Supreme Court approved of the State's power to relinquish the public's trust rights, *see, e.g., Greater Providence Chamber of Commerce v. State*, 657 A.2d 1038, 1041-44 (R.I. 1995), this has only emphasized that these are not rights belonging to the landowner.

Rights recognized by the common law overlap with those enshrined in the state constitution. Rhode Island endorses the public trust doctrine,[59] *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259-60 (R.I. 1999), granting the state a fee interest in tidal wetlands.[60] The public trust doctrine has been codified in harbors and rivers laws and regulations, such as was exercised over SGI's 1960's applications. Under both the common law and regulatory practice dating back centuries, Rhode Island law has never recognized full title of riparian owners in tidal lands, and there is no right to fill. *Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902). The State holds the property in public trust, and may give riparian owners permission to fill. *Id.* at 156.

[59] "Under the public-trust doctrine, 'the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.'" *Town of Warren v. Thornton-Whitehouse*, 740 A.2d 1255, 1259 (R.I. 1999) (citation omitted). "'In this state, at common law, the fee of the soil in tide waters below high-water mark is in the state.'" *Dawson v. Broome*, 53 A. at 156 (quoting *Bailey v. Burges*, 11 R.I. 330, 331 (1876)). *See also, e.g., Gerhard v. Bridge Comm'rs*, 5 A. 199, 200 (R.I. 1886) ("as trustee for public purposes"). The various harbor and river agencies granting leave to fill tidal wetlands (including the entity that denied SGI's applications in the 1960s) did not restrict a property right of the owner to fill (as none existed), but rather gave permission or acquiescence of the State yielding the public's rights in such areas. *See Dawson*, 53 A. at 156. The connection we assert among

Finally, if a true and meaningful application for a seventy-four-lot subdivision had been filed, it would

---

common law, statute, and regulation, *supra* at Argument III.B$_4$ was closed further by legislation establishing fill in public trust lands not authorized by the state to be "deemed to be a public nuisance." R.I. Gen. Laws ch. 118, § 14 (1898), *quoted in Dawson*, 53 A. at 155.

[60] The antecedent state law of public trust, even though not reached by the state courts, applies without question to Palazzolo's land below the high tide mark. *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895) (applying the public trust doctrine to a "thatch bed," *i.e.*, salt marsh). *Cf.* Alfred Redfield, *Development of a New England Salt Marsh*, 42 Ecological Monographs 201 (1972) (explaining the meaning of the term "thatch"). As a riparian owner, Palazzolo would have certain very limited property rights, which would not support a takings claim for the denial of such filling. 32 A. at 166 ("These [private riparian rights] do not amount to seisin in fee, but are in the nature of franchises or easements."); *accord Rhode Island Motor Co. v. City of Providence*, 55 A. 696 (R.I. 1903). The riparian owner has only "a sort of inchoate or potential title by virtue of his right to fill out under leave of the state." *Dawson v. Broome*, 53 A. at 157. In *Gerhard v. Bridge Comm's.*, 5 A. 199 (R.I. 1886), the riparian landowner sought "just compensation" based on the State's physical invasion of such land, namely constructing the pier of a bridge. The court refused, noting that the soil on which the pier rested belonged to the State. *Id.* at 200.

have implicated the sewage control authority of the State. Even good and clear title does not confer on a Rhode Island landowner a property right to emit sewage. *Bd. of Purification of Waters v. City of East Providence*, 133 A. 812, 814 (R.I. 1926). These legal doctrines are all underpinned by ancient equitable maxims recognized in Rhode Island: "Sic utere tuo ut alienum non laedas," *Horton v. Old Colony Bill Posting Co*, 90 A. 822, 837 (R.I. 1914), and "salus populi est suprema lex" *R.I. Dep't of Mental Health, Retardation & Hosps. v. R.I. Council 94, AFSCME*, 692 A.2d 318, 325 (R.I. 1997).

The depth, consistency and antiquity of the background principles of state law applicable in this case support the state court's conclusion that those state law principles, carried forward into the regulations complained of, preclude any claim under *Lucas*. Under Rhode Island law, the title that Palazzolo obtained when he acquired the parcel in 1978 did not include the inherent right to develop the property by filling the parcel's coastal wetlands.[61]

---

[61] Alternatively, Palazzolo could not maintain a viable takings claim under *Lucas* even if the restrictions imposed by Rhode Island went beyond historically-rooted background principles. Just as the lack of reasonable investment-backed expectations may be "so overwhelming" as to be dispositive of a takings claim under *Penn Central, Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), it may be likewise preclusive of a claim under *Lucas*. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed. Cir. 1994); *Good v. United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct.1554 (2000). As described in Argument IV, *infra*, the clarity and settled character of the state law restrictions on development at the time of Palazzolo's acquisition deprived him of any reasonable investment-backed expectations that he could develop the parcel in the manner he later proposed, regardless of their roots in background principles of state law.

IV. *PENN CENTRAL'S* ANALYSIS DOES NOT SUPPORT PALAZZOLO'S TAKINGS CLAIM

Although Palazzolo expressly confined his takings challenge to his claim of a *per se* taking under *Lucas*,[62] the Rhode Island Supreme Court nevertheless described how Palazzolo would not have succeeded had he relied on the test set forth in *Penn Central*. *See* PA A-17. Under *Penn Central*, the three factors relevant to the judicial inquiry are "the economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The Rhode Island Supreme Court addressed only the "investment-backed expectations" factor,[63] *see* PA A-17, A-18, and concluded that Palazzolo's "lack of reasonable investment-backed expectation is dispositive" of any possible takings claim. PA A-17. The court relied on the trial court's finding to that

---

[62] *See* n. 44, *supra*.

[63] In some circumstances, the force of just one of the three factors can be so overwhelming as to be dispositive of the takings inquiry. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that the "character of the governmental action" -- there a "permanent physical occupation" of private property by a sovereign -- was enough to justify a finding that an unconstitutional taking had occurred. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984), the Court held that consideration of the government's "interference with reasonable investment-backed expectations" was sufficient to dispose of a takings challenge. And, of course, in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court focused exclusively on the "economic impact" of the challenged regulation.

effect, which was rooted in the further finding that when Palazzolo acquired the parcel, "there were already regulations in place limiting [his] ability to fill the wetlands for development." *Id.*

In 1978, when Palazzolo acquired the parcel, Rhode Island had in place a comprehensive program for land use management in the coastal areas where Palazzolo's parcel was located. The Coastal Resources Management Program identified, in clear and precise terms, the very kind of property Palazzolo owned and the restrictions necessary on development in such areas based on the sheer fragility of the surrounding ecosystem. *See* Statement III.B; *supra;* PA A-17. There was absolutely no suggestion in the existing regulatory scheme that the kind of massive filling contemplated by either Palazzolo's 1983 or 1985 proposal would be permitted for an intensive residential subdivision, "erosion control," or the so-called "beach."

Wholly apart from the proper scope of "background principles" of law under the *Lucas per se* takings test, there can be no doubt of the validity of the state court's conclusion that such pre-existing legal restrictions can defeat the reasonableness of a landowner's investment backed expectations.[64] *See* PA A-17. The challenged regulatory program preceded his ownership, and

[64] Any reliance Palazzolo places, *see* Pet. Br. 3, on the Town of Westerly's zoning of the relevant parcel for subdivision development is entirely misplaced. The town's action cannot limit the sovereign power of either the State or the federal government to impose their own restrictions on development. Moreover, in Rhode Island, a developer does not obtain a vested right until a building permit has been issued and construction has begun. *Shalvey v Zoning Bd. of Review*, 210 A.2d 589, 593-94 (R.I. 1965); *Tantimonaco v. Zoning Bd. of Review*, 232 A.2d 385, 387 (R.I. 1967); *see also Lanmar Corp. v. Rendine*, 811 F. Supp. 47, 51 (D.R.I. 1993).

simply made plain what landowners, including Palazzolo, had long known about their limited ability to fill coastal marshland. Indeed, Palazzolo's predecessor corporation, SGI, had sought and been denied permission to do just what he then proposed in nearly identical new filings.[65]

Neither of the other two *Penn Central* factors would support a finding of a taking here. Palazzolo's "economic impact" claim is based on a speculative allegation of lost profits mightily disbelieved by the courts below (*see supra* n.32; Statement VI.B, *supra*). The "character" of the governmental action at issue here, moreover, involves the very kind of governmental action sustained in *Penn Central*. "[T]he [development restriction] neither exploits [Palazzolo's] parcel for [governmental] purposes nor facilitates nor arises from any entrepreneurial operations of the [State]." *Penn Central*, 438 U.S. at 135. "This is no more an appropriation of property by government than is a zoning law . . . ." *Id.*

Indeed, the law challenged in this case provides the very kind of "reciprocity of advantage" (because it "applies to a broad cross section of land") that the *Penn*

[65] One *amicus* posits that this Court's taking analysis in *Lucas* and other recent court decisions refine and effectively supersedes the analysis previously set forth by the Court in *Penn Central*. *See* Br. *Amicus Curiae* of Board of County Commissioners of La Plata County. Because we do not believe that the Court need reach that issue to dispose of this case, we do not address that distinct argument ourselves, other than to note it as an alternative basis for rejecting Palazzolo's *Penn Central* theory. Likewise, it is being suggested by the same *amicus* that Rhode Island's sovereign immunity provides an alternative basis for upholding the judgment below. *Alden v. Maine*, 527 U.S. 706 (1999), represents an important new legal development that the State could not fairly have been required to anticipate in the context of this case.

Central dissent acknowledged was sufficient to defeat a regulatory takings claim. *See id.* at 147 (Rehnquist, J., dissenting). Palazzolo, like other landowners in the area, has been both benefited and burdened by the development restrictions. All have investment-backed expectations about what can and can not be done in the heavily regulated wetlands. [66] All are to a degree interdependent. By enforcing long-settled state law through the regulatory process, the state protects those expectations, and averts the "tragedy of the commons" that otherwise would threaten the resource with total destruction, to the detriment of everyone, including Palazzolo.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

---

[66] Somewhat ironically, Palazzolo's initial complaint in this case acknowledges the dependency of his parcel's value on strict enforcement by the government of permit restrictions, and the interdependency of neighbors' values on enforcement and compliance with regulations. *See* Complaint ¶¶ 8, 9, 13, 18, RA 27-28, 29, 30:

> [T]he town has continued to issue building permits to other abutters along the pc l causing more sewerage to be dumped into the pond which increases the damage to Palazzolo's said land.
>
> . . . .
>
> The Defendants, by their refusal to correct or to allow the Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property and have taken the same without paying just compensation therefor.

Respectfully submitted.

Brian A. Goldman, Esq.
Goldman & Biafore
101 Dyer Street, No. 301
Providence, RI 02903
(401) 274-1300

Richard J. Lazarus
Georgetown University
Law Center
600 New Jersey Ave. ,
Washington, DC 20001
Of Counsel

Sheldon Whitehouse
Attorney General
Michael Rubin
Assistant Attorney General
Counsel of Record
Department of the
Attorney General
150 South Main Street
Providence, RI 02903
(401) 274-4400
N.W. Ex. 2297

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *ex rel.*
PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

RESPONDENTS' APPENDIX

TABLE OF CONTENTS

Page

General Laws of 1938, Chapter 112 ..... A-1

Complaint (August 19, 1966) (Contained in Ex. 14) ... A-4

Superior Court Order (December 30, 1966) (Contained in Ex. 14) A-7

State of Rhode Island Coastal Resources Management Program (June 28, 1983) A-9

The Program's Enabling Legislation (1971) as amended A-9

Regulations A-11

Coastal Resources Management Council Management Procedures A-22

Transcript of Coastal Resources Management Council Proceedings (August 18, 1983) A-24

Testimony of Anthony Palazzolo A-24

Complaint (June 20, 1988) A-25

Transcript of Proceedings (June 18-26, 1997) A-31

Testimony of Grover John Fugate A-31

Testimony of John P. Caito A-41

Testimony of Steven M. Clarke A-42

Testimony of Thomas S. Andolfo A-46

Letter from Army Corps of Engineers (November 23, 1971) (Contained in Ex. 14) A-47

Inter-Office Memo to Div. of Coastal Resources (August 24, 1983) (Contained in Ex. 14) A-49

TABLE OF CONTENTS – Continued

Page

Recommendation of Subcommittee (No Date) (Contained in Ex. 14) A-50

Biologist's Field Report (July 15, 1985) (Ex. 10) A-55

Letter from Army Corps of Engineers (July 17, 1985) (Contained in Ex. I) A-66

Engineer's Field Report (July 25, 1985) (Ex. 9) A-68

Trial Testimony (June 18 & 19, 1997) (Trial Transcript) Portion of Mr. Anthony Palazzolo's Testimony A-78

General Laws of 1938
TITLE XIV.

CHAPTER 112.

§ 1. Within the department of public works there shall be a division of harbors and rivers, and the director of public works shall appoint a chief of such division, who shall enforce the provisions of this chapter.

* * *

§ 8. The chief of the division of harbors and rivers may mark out harbor-lines suitable to be established in any of the public tide-waters of the state, where such harbor-lines have not already been established, and after the same shall have been platted may report the same to the governor and senate for their approval; and when such harbor-lines shall have been approved by the governor and senate or as the same shall be modified and approved thereby, the same shall be confirmed and established; but before any harbor-line shall be marked out or platted by the chief of the division of harbors and rivers, he shall appoint a time and place for hearing all persons interested therein, and shall give notice of such hearing by publishing the same for at least 30 days in the newspaper which he may determine will probably give the most publicity of such notice among the persons most likely to be interested therein, and at the time and place appointed, or at such adjournment of such hearing as said chief of the division shall make, he shall hear all persons interested for or against the establishment of such harbor-line, who may appear to be heard therein

before the said division shall proceed to mark out the same.

§ 9. The chief of the division of harbors and rivers shall have the general care and supervision of all the public harbors and tide-waters within the state, with authority to prosecute for and to cause to be removed all unauthorized obstructions and encroachments therein, and may cause such harbors and public waters to be surveyed and platted and may make such examinations and observations as he may deem necessary to protect and develop the rights and interests of the state in such harbors and public waters; and may employ such engineers and other service as may be necessary to this end.

§ 10. The chief of the division of harbors and rivers shall regulate the depositing of mud, dirt and other substances in the public tide-waters of the state, and shall prescribe the places where the same may be deposited; and every person who shall place or deposit mud, dirt or other substances in said waters without obtaining proper authority therefor, shall be fined for each offense $100.00, one-half thereof to the use of the state and one-half thereof to the use of the complainant.

§ 11. All persons who shall build into or over public tide-waters, by authority of said division, or by authority of the general assembly, any wharf, pier, bridge or other structure, or drive any piles into the land under public tide-water, or fill any flats, shall, before beginning such work, give written notice to the division of harbors and rivers of the work they intend to do, and submit plans of any proposed wharf or other structure and of the flats to be filled, and of the mode in which the work is to be

performed; and no such work shall be commenced until the plan and mode of performing the same shall be approved in writing by the chief of said division; and said chief may alter the said plans at his discretion and may prescribe the direction, limits and mode of building the wharves or other structures: *Provided*, that nothing herein contained shall be construed to impair the rights of any riparian proprietors to erect wharves authorized to be erected under any of the laws establishing harbor-lines within the state or otherwise by the general assembly.

* * *

§ 13. Every erection made into or encroachment upon the public tide-waters of the state, not authorized by the general assembly or by the division of harbors and rivers, shall be deemed to be a public nuisance and shall be prosecuted as such by the attorney-general.

* * *

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, Sc. Civil Action, File Number ___

ANTHONY PALAZZOLO
vs.
FREDERICK C. LEES, in his capacity as Director of the Department of Natural Resources of the State of Rhode Island

COMPLAINT
66-3490

1. Plaintiff, a resident of the Town of Westerly, County of Washington, brings this action pursuant to the provisions of Chapter 42-35 of the General Laws of Rhode Island, 1956, as amended, especially Section 15 thereof against defendant in his capacity under the provisions of Chapter 42-17.1 of General Laws of Rhode Island, 1956, as amended.

2. On April 29, 1966, the plaintiff filed with the Division of Harbors and Rivers (statutory representative of defendant for relevant purposes) an application to grade the beach in front of property owned by him on Winnapaug Pond in the Town of Westerly, which said application is attached hereto as Exhibit A and by this reference is incorporated herein.

3. On July 20, 1966, defendant, by letter to the plaintiff, denied the application alleged in paragraph two hereof upon the purported authority of Chapter 140 of

the Public Laws of Rhode Island 1965, which said decision of defendant is attached hereto as Exhibit B and by this reference is incorporated herein.

4. The application filed by plaintiff as alleged in paragraph two hereof, upon a printed form supplied by an agent of defendant, was purportedly required by the provisions of Section 46-6-1 of the General Laws of Rhode Island 1956, as amended, which said statutory section merely confers certain regulatory authority and does not authorize denial by defendant of the permission requested by the plaintiff.

5. Chapter 140 of the Public Laws of Rhode Island 1965 (Rhode Island General Laws, 1956, as amended, Section 2-1-13, etseq.) upon which the decision of defendant alleged in paragraph three hereof was based does not authorize the denial of plaintiff's application as determined by defendant and, in any event, the provisions thereof have not been complied with by defendant so that the statutory conditions precedent for the operation of said statute have not been fulfilled.

6. Under the provisions of Chapter 26 of the Public Laws of Rhode Island, 1965 (R.I. General Laws, 1956, as amended, Section 11-46.1-1), it is a criminal act to excavate in or to disturb "intertidal salt marshes", as defined in said statute, without first having obtained permission from defendant (statutory successor to the Director of Public Works under the provisions of chapter 42-17.1 of the General Laws of Rhode Island, 1956, as amended by Chapter 137 of Rhode Island Public Laws, 1965). Said statute contains no standards for the denial by defendant of an application for said permit and unless defendant is

required to issue said permit, said statute would be unconstitutional under the state and federal constitutions as applied to plaintiff in that the same would constitute an invalid exercise of the police power and a denial of due process of law.

7. As a riparian owner on the aforesaid Winnapaug Pond, plaintiff possesses property rights therein which the aforesaid action of defendant purportedly based as aforesaid on statutory authority seeks to infringe without payment of compensation in violation of plaintiff's constitutional rights.

8. For the reasons stated, the aforesaid decision of defendant in refusing to grant a permit to the plaintiff as requested was in excess of constitutional and statutory authority, and erroneous as a matter of law.

WHEREFORE, plaintiff demands (1) that the aforesaid decision of defendant be reversed, (2) that plaintiff have relief by way of mandamus pursuant to Rule 81(d) directing defendant to grant the permit requested, and (3) that plaintiff have such other and further relief in the premises as this Court may deem just.

ANTHONY PALAZZOLO
By his attorneys,

Roberts & McMahon
/s/ William McMahon
Roberts & McMahon
405 Industrial Bank Building
Providence, Rhode Island 01903

STATE OF RHODE ISLAND SUPERIOR COURT
PROVIDENCE, Sc. Civil Action, File No. 66-3490

ANTHONY PALAZZOLO
vs.
FREDERICK C. LEES, in his capacity as Director of the Department of Natural Resources of the State of Rhode Island

ORDER

(Filed Dec. 30, 1966)

The above matter came on for hearing upon the plaintiff's appeal under the provisions of Chapter 42-35 of the General Laws of Rhode Island, as amended, and following arguments of counsel and upon consideration thereof it appearing that the administrative record herein is sufficient for the purposes of judicial review as provided for in Section 42-35-15 of the General Laws of Rhode Island as amended, it is hereby ordered.

Pursuant to the provisions of said Section 42-35-15 of the General Laws of Rhode Island, as amended, the within case is hereby remanded to the Department of Natural Resources of the State of Rhode Island for hearing and finding of fact and without prejudice to the plaintiff's right to amend his application which is set forth in the complaint.

Entered as the Order of this Court this 30th day of December A.D. 1966.

By order
/s/ [Illegible]

ENTER:

[Illegible] J.
Dated: 12/30/66

The State of Rhode Island
Coastal Resources Management Program

As Amended June 28, 1983

The Program's Enabling Legislation (1971) as Amended

Chapter 23 of the General Laws of Rhode Island
Coastal Resources Management Council

46-23-1. Legislative Findings. Creation. The general assembly recognizes and declares that the coastal resources of Rhode Island, a rich variety of natural, commercial, industrial, recreational, and aesthetic assets are of immediate and potential value to the present and future development of this state; that unplanned or poorly planned development of this basic natural environment has already damaged or destroyed, or has the potential of damaging or destroying, the state's coastal resources, and has restricted the most efficient and beneficial utilization of such resources; that it shall be the policy of this state to preserve, protect, develop, and where possible, restored the coastal resources of the state for this and succeeding generations through comprehensive and coordinated long-range planning and management designed to produce the maximum benefit for society from such coastal resources; and that preservation and restoration of ecological systems shall be the primary guiding principle upon which environmental alternation of coastal resources will be measured, judged, and regulated.

That effective implementation of these policies is essential to the social and economic well-being of the people of Rhode Island because the sea and its adjacent lands are major sources of food and public recreation,

because these resources are used by and for industry, transportation, waste disposal, and other purposes, and because the demands made on these resources are increasing in number, magnitude, and complexity; and that these policies are necessary to protect the public health, safety, and general welfare. Furthermore, that implementation of these policies is necessary in order to secure the rights of the people of Rhode Island to the use and enjoyment of the natural resources of the state with due regard for the preservation of their values, and in order to allow the general assembly to fulfill its duty to provide for the conservation of the air, land, water, plant, animal, mineral, and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration, and restoration of the natural environment of the state.

That these policies can best be achieved through the creation of a coastal resources management council as the principal mechanism for management of the state's coastal resources.

* * *

46-23-6. POWERS AND DUTIES. In order to properly manage coastal resources the council shall have the following powers and duties:

* * *

The council is authorized to formulate policies and plans and to adopt regulations necessary to implement its various management programs.

Any person, firm, or governmental agency proposing any development or operation within, above, or beneath the tidal water below the mean high water mark, extending out to the extent of the state's jurisdiction in the territorial sea shall be required to demonstrate that its proposal would not (1) conflict with any resources management plan or program; (2) make any area unsuitable for any uses or activities to which it is allocated by a resources management plan or program; or (3) significantly damage the environment of the coastal region. The council shall be authorized to approve, modify, set conditions for, or reject any such proposal.

* * *

Regulations

Section 100. Alternations and Activities That Require an Assent from the Coastal Resources Management Council

100.1. Tidal Waters, Shoreline Features, and Contiguous Areas

A. A Council Assent is required for all alterations and activities listed in Table 1 that are proposed for (1) tidal waters within the territorial sea (including coastal pounds, some of which are not tidal but which are coastal waters associated with a barrier beach system); (2) shoreline features; and (3) areas contiguous to shoreline features.

* * *

D. Shoreline features together encompass the entire shore and are assigned to the following categories:

(1) Coastal beaches and dunes;

(2) barrier beaches;

(3) coastal wetlands;

(4) coastal cliffs, bluffs, and banks;

(5) rocky shores; and

(6) manmade shorelines.

* * *

Section 120. Variances

A. Applicants desiring a variance from a standard shall be granted an Assent only if the Council finds that the following five criteria are met:

(1) The proposed alteration conforms with applicable goals and policies in Parts Two and Three.

(2) The proposed alteration will not result in significant adverse environmental impacts or use conflicts.

(3) Due to conditions at the site in question, the standard will cause the applicant an undue hardship.

(4) The modification requested by the applicant is the minimum necessary to relieve an undue hardship.

(5) The undue hardship is not the result of any prior action of the applicant.

B. Relief from a standard does not remove the applicant's responsibility to comply with all other Program requirements.

Section 130. Special Exceptions

A. Special exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the requirements of this document only if and when the applicant has demonstrated that:

(1) The proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests. The activity must be one or more of the following: (a) an activity associated with public infrastructure such as utility, energy, communications, transportation facilities; (b) a water-dependent activity that generates substantial economic gain to the state; and/or (c) an activity that provides access to the shore for broad segments of the public.

(2) All reasonable steps shall be taken to minimize environmental impacts and/or use conflict.

(3) There is no reasonable alternative means of, or location for, serving the compelling public purpose cited.

* * *

Section 200
Tidal and Coastal Pond Waters

A. Introductory Findings

1. Rhode Islanders have a deep commitment to their coastal environment. Their concern for Narragansett Bay and the South Shore coastal ponds has been voiced in numerous ways, including support of landmark legislation in 1971 that created the Coastal Resources Management Council, endorsement of many of the efforts of environmental organizations such as Save the Bay and the Audubon Society of Rhode Island, and passage of the largest bond issue in the state's history in order to relieve chronic pollution in upper Narragansett Bay caused by the antiquated Providence municipal sewage treatment plant. The concerns of the public have in large measure been responsible for decisions not to build oil refineries in Jamestown and Tiverton, and to halt the indiscriminate destruction of salt marshes and the improper disposal of dredged spoils, Narragansett Bay is widely accepted as the state's greatest resource, and our coastal waters and shoreline are the focus not only of tourism but of efforts to attract new businesses into the state. Rhode Island strives to maintain the image of a desirable place to work and raise a family, and these attributes are inextricably bound to a varied and beautiful shoreline, where water quality and, no less important, visual quality are excellent and well protected. The qualities that make Rhode Island's coast beautiful and an unparalleled recreational resource are fully as important as the more readily quantifiable commercial and industrial water-dependent activities. The designation of large stretches of waters or coastline for conservation and low-intensity use by this

Program recognizes these facts and will help maintain a high quality of coastal environment for future generations of Rhode Islanders.

* * *

200.2.
Type 2 Low-Intensity Use

A. Definition

This category includes waters in areas with high scenic value that support low-intensity recreational and residential uses. These waters include seasonal mooring areas where good water quality and fish and wildlife habitat are maintained.

B. Findings

* * *

2. Major portions of the salt ponds along the South Shore between Watch Hill and Point Judith are assigned to Type 2 waters. Nearly all have retained their scenic and natural characteristics while accommodating residential docks, minor dredged channels, and small-scale shoreline protection structures. Each coastal pond is an individually distinct ecosystem and a unique feature of great scenic value. Continuing residential development within the watersheds of the salt ponds poses severe threats to future water quality in the form of both bacterial contamination and eutrophication.

* * *

5. Since runoff can be a major source of pollutants from developed areas to poorly flushed estuaries, new or

enlarged discharges shall be permitted in to the following Type 2 waters only when it is demonstrated that no reasonable alternative exists and that no significant adverse impact to the receiving waters will result:

(a) Winnapaug Pond

* * *

Table 4. Undeveloped, Moderately Developed, and Developed Barrier Beaches.

* * *

Developed

Atlantic Beach, Westerly

* * *

210.2
Barrier Beaches

* * *

Barrier beaches are narrow strips of land made of unconsolidated material, usually extending parallel to the coast and separated from the mainland by a coastal pond, tidal water body, or coastal wetland.

* * *

Developed barrier beaches contain houses and/or commercial/industrial structures; they may also contain surfaced roads and structural shoreline protection facilities.

* * *

1. Rhode Island's South Shore coastal ponds and a frequently low-lying mainland are protected from the forces of the open ocean by a chain of low, narrow barrier beaches.

* * *

2. On barrier beaches classified as developed in Table 4, the Council's goal is to ensure that the risks of storm damage and erosion for the people inhabiting these features are minimized, that activities that may reduce the effectiveness of the barrier as a storm buffer are avoided, and that associated wetlands and ponds are protected.

* * *

210.3
Coastal Wetlands

A. Definition

Coastal wetlands include salt marshes and freshwater or brackish wetlands contiguous to salt marshes. Areas of open water within coastal wetlands are considered a part of the wetland.

Salt marshes are areas regularly inundated by salt water through either natural or artificial water courses and where one or more of the following species predominate: smooth cordgrass (*Spartina alterniflora*), salt meadow grass (*Spartina patens*), spike grass (*Distichlis spicata*), black rush (*Juncus gerardi*), saltworts (*Salicornia* spp.). sea lavender (Limonium carolinianum), salt – marsh bulrush (*Scirpus* spp.). high tide bush (*Iva frutescens*).

Contiguous and associated freshwater or brackish marshes are those where one or more of the following species predominate: tall reed (*Phragmites communis*), tall cordgrass (*Spartina pectinata*), broadleaf cattail (*Typha latifolia*), narrowleaf cattail (*typha angustifolia*), spike rush (*Eleocharts rostellala*), chairmaker's rush (*Scirpus americana*), creeping bentgrass (*Agrostis palustris*), sweet grass (*Hierochloe odorata*), wild rye (*Elymus virginicus*).

B. Findings

1. Coastal wetlands are important for a variety of reasons. They provide food and shelter for large populations of juvenile fish and are nurseries for several species of fish. The mud flats and creeks associated with many coastal wetlands are rich in shellfish, particularly soft-shelled clams. Coastal wetlands also provide important habitat for shorebirds and waterfowl, and many are among the most scenic features of the Rhode Island shore. Coastal wetlands are effective in slowing erosion along protected shores.

* * *

C. Policies

* * *

4. Alterations to salt marshes and contiguous freshwater or brackish marshes abutting Type 2 waters are prohibited except for minor disturbances associated with (a) residential docks and walkways approved pursuant to the standards set forth in Section 300.3, and (b) approved

construction or repair of structural shoreline protection facilities.

* * *

Section 300.
In Tidal and Coastal Pond Waters, on Shoreline Features and Their Contiguous Areas

* * *

B. Prohibitions

1. Filling, removing, or grading is prohibited on beaches, dunes, undeveloped barrier beaches, coastal wetlands, cliffs and banks, and rocky shores adjacent to Type 1 and 2 waters unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area or buffer against storms.

2. Filling, removing, or grading on coastal wetlands is prohibited adjacent to Type 1 and 2 waters, and in coastal wetlands designated for preservation adjacent to Type 3, 4, 5, and 6 waters, unless a consequence of an approved mosquito-control ditching project (Section 300.12).

* * *

B. Prerequisites

1. Applicants for residential structures shall obtain, as necessary, a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued.

2. Applicants proposing to build an individual sewage disposal system (ISDS) shall obtain a permit from the Department of Environmental Management.

* * *

4. Applicants shall demonstrate that connections to public water supply and sewer systems shall be provided where on-site water withdrawal and/or sewage disposal will have a significant environmental or public health impact.

* * *

300.6.
Sewage Treatment and Disposal

A. Definitions

* * *

2. Individual sewage disposal system (ISDS): any arrangement for sanitary sewage disposal by means other than discharge into a public sewer system.

* * *

C. Prerequisites

1. Applicants for Council Assents to construct, alter, or extend individual sewage disposal systems or point source discharges shall first obtain a permit from the Department of Environmental Management.

* * *

300.10.
Filling in Tidal Waters

* * *

B. Policies

1. It is the Council's policy to discourage and minimize the filling of coastal waters.

2. In considering the merits of any given proposal to fill tidal waters, the Council shall weigh the public benefit to be served by the proposal against the loss or degradation of the affected public resource(s).

C. Prerequisites

1. A water quality certification from the Department of Environmental Management shall be required.

2. Filling of tidal waters requires an Assent from the Army Corps of Engineers.

D. Prohibitions

1. Filling in Type 1 and 2 waters is prohibited unless the primary purpose of the project is to preserve or enhance the area as a conservation area and/or a natural buffer against storms.

* * *

Glossary

* * *

Coastal pond. A coastal lagoon usually located behind a barrier beach which in its natural condition, permanently or occasionally exchanges waters with the ocean.

* * *

COASTAL RESOURCES MANAGEMENT COUNCIL

MANAGEMENT PROCEDURES

* * *

4.2 Information requirements, application forms and fees:

[1] Application forms may be obtained from the Coastal Resources Management Council. Oliver Stedman Government Center, Tower Hill Road, Wakefield, R.I. 02879 or by calling 277-2476.

[2] An application checklist/instruction sheet will be forwarded to each applicant together with required forms.

[3] Applicants must complete four [4] forms and return them together with a $50.00 processing fee to the Coastal Resources Management Council.

[4] Applicants shall be required to obtain and certify that they have in their possession current approvals from municipal bodies which are otherwise required for the proposed action. Municipal approval shall be construed to mean compliance and conformity with all applicable comprehensive plans and zoning ordinances and/or the necessary variance, exception and other special relief therefrom.

Applicants shall further be required to obtain and certify that they have in their possession current approvals from all other agencies which are otherwise required for the proposed action.

The above required municipal and state approvals shall be construed as a prerequisite for any application before the Council considers

the application. The Council may waive the requirements of obtaining approvals in the usual sequence by a majority vote of the Council. But a final assent shall not issue until all required approvals have been obtained.

In contested cases, the Subcommittee shall not proceed until it has received the comments from staff biologist, staff engineer. Historical Preservation Commission, Statewide Planning and water quality certification comment.

* * *

COASTAL RESOURCES MANAGEMENT COUNCIL

RE: ANTHONY PALAZZOLO
File No: 83-3-55

THURSDAY, AUGUST 18, 1983
WESTERLY TOWN HALL
WESTERLY, RHODE ISLAND
7:30 p.m.

COUNCIL MEMBERS PRESENT

JOSEPH F. TURCO, CHAIRMAN
BARBARA B. COLT and
DONALD C. BROWN and
JOHN D. BIAFORE, ESQUIRE

APPEARANCES

ANTHONY PALAZZOLO, PRO SE

HAROLD B. SOLOVEITZIK, ESQUIRE. . . . FOR THE OBJECTORS

Anthony Palazzolo

* * *

[22] Q All right. Have you ever had a perk test made of this property?

A No.

Q Do you know whether or not it would pass a perk test?

A It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that.

* * *

STATE OF RHODE ISLAND
Washington, S.C.

SUPERIOR COURT

ANTHONY PALAZZOLO,
Individually and as successor in title to Shore Gardens, Inc.

VS.

COASTAL RESOURCES MANAGEMENT COUNCIL of the State of Rhode Island, ROBERT R. BENDICK in his capacity as Director of the Rhode Island Department of Environmental Management, formerly the Department of Natural Resources, and JOSEPH PELLEGRINO as Town Treasurer of the Town of Westerly

C.A. No.
WM 88-297

COMPLAINT FOR ASSESSMENT OF DAMAGES

I. PARTIES

1. Plaintiff is the owner of certain real estate in the Town of Westerly located between Atlantic Avenue and Winnipaug Pond consisting of 74 platted lots, being described on the Westerly Tax Assessor's map as Plat 155 Lots 68 through 129 and 132 through 143 inclusive. Said land stands of record in the name of Shore Gardens, Inc. Shore Gardens, Inc. was a Rhode Island corporation whose charter was forfeited by the Secretary of State and whose sole stockholder, officer and director was the Plaintiff. Shore Gardens, Inc. had no creditors at the time of its Charter forfeiture and by virtue of the doctrine set forth in the Rhode Island case of *DiPrete vs. Vallone*, 72 RI 137 48 A. 2d 250, the Plaintiff is the the [sic] successor in

interest to Shore Gardens, Inc. and is the sole owner of the real estate in question.

2. Defendant Coastal Resources Management Council is an agency of the State of Rhode Island created under and by virtue of the Public Laws of 1971, Chapter 279, as amended by Chapter 212 of the Public Laws of 1985 and now codified as Chapter 46-23 of the General Laws.

3. Defendant Robert R. Bendict is the Director of the Department of Environmental Management of the State of Rhode Island which is here being sued by virtue of its duties under the provisions of Chapter 2-1 of the General Laws and their application to the Plaintiff's real estate. Said Department formerly was the Department of Natural Resourses [sic] of the State of Rhode Island.

4. The Defendant Town of Westerly is a municipal corporation in the State of Rhode Island capable of being sued by and through its Town Treasurer, Joseph Pellegrino, under and by virtue of the provisions of Section 45-15-1 of the General Laws. Plaintiff has filed many claims with the Town Council of the Town of Westerly for the damages here being sought under the provisions of Section 45-15-5 of the General Laws and each time has been refused or no action has been taken thereon.

II. JURISDICTIONAL STATEMENT

5. This action is brought as a petition for assessment [sic] of damages to recover just compensation for the inverse condemnation of Plaintiff's said real estate. This action is grounded in and brought under and by virtue of the provisions of the "Just Compensation" clause of the

Fifth Amendment to the Constitution of the United States as made applicable to the States by virtue of the "Due Process" clause of Section I of the Fourteenth Amendment to the Constitution of the United States, and also under and by virtue of the provisions of Section 16 of Article I of the Constitution of Rhode Island of 1843 and as amended by the Constitution of Rhode Island adopted December 4, 1986.

III. CAUSE OF ACTION

6. The Plaintiff acquired his said real estate in 1961 by his acquisition of 100% of the stock of Shore Gardens, Inc. Shore Gardens, Inc. acquired said real estate in 1959 and said property had been platted and zoned residential for 74 lots since 1936.

7. The Plaintiff's said property borders on Winnipaug Pond also known as Brightman's Pond in the Misquamicut section of Westerly.

8. The Town of Westerly by virtue of its failure to properly regulate the dumping and discharge of sewerage into Winnipaug Pond has caused the natural drainage of Winnipaug Pond to become impeded which in turn has caused the Plaintiff's land to become eroded and flooded and caused what had been Plaintiff's Pond frontage and buildable land to be turned into a natural cesspool which is marshy and unbuildable.

9. Plaintiff has on many occasions requested the Defendant Town to prevent the discharge of sewerage and the dumping of materials into the pond which was

causing the damming of the pond in front of the Plaintiff's said property, thus causing Plaintiff's said property to become flooded and eroded, but the Town has failed and refused to do anything about the problem. In fact, the town has continued to issue building permits to other abutters along the pond causing more sewerage to be dumped into the pond which increases the damage to Plaintiff's said land.

10. On March 29, 1962 the Plaintiff made application to the Division of Harbors and Rivers of the Rhode Island Department of Natural Resources (Now the Department of Environmental Management) for permission to dredge the pond, build bulkheads and deposit the silt on his land to restore the natural drainage to the pond. This application was held without action by the Department although the Division of Fish and Game of the Department of Natural Resources was in favor of the application.

11. On May 16, 1963 the Plaintiff further revised his application. This also was held without action by the Department. On April 29, 1966 the application was further modified to maintain a beach along the pond.

12. On, to wit, July 20, 1966 the Department of Natural Resources issued its decision denying Plaintiff's application. Plaintiff then appealed to the Superior Court which remanded the matter back to the Department for further hearings. Finally, on April 1, 1971 the Department approved Plaintiff's application. However, on April 18, 1971 this approval was revoked without cause or reason by the Department.

13. From 1971 to 1983 the Plaintiff continued in his attempt to get the Town to either put in sewers or prevent the dumping of sewerage into the pond, all to no avail.

14. On, to wit, April 4, 1983 Plaintiff, representing himself, made a new application to the Coastal Resources Management Council for permisssion [sic] to erect a bulkhead along the pond and fill his land. This application was denied.

15. On, to wit, January 21, 1985 Plaintiff made another application to the Coastal Resources Management Council, this time for an exception to fill in a portion of his land which had been eroded in order to make a beach club on it. There was no request that the Plaintiff be allowed to build residences on his land as he has the right to do. This application was also denied.

16. The Plaintiff purchased his said land for residential use and has been paying taxes to the Town of Westerly on 74 residential lots from the time of purchase until the present time. The Plaintiff had been trying for the past 27 years to use his land for residential or recreational purposes but has been prevented from doing so by reason of the supposed "regulations", actions and inactions of the Defendants.

17. After stalling his initial application for nine years, the Department of Natural Resources granted and then revoked its assert to Plaintiff's dredging the pond. During this nine year period the situation had worsened, there was more erosion and flooding of his land and more impeding of the drainage of the pond thus creating a larger marsh and a smaller pond.

18. The Defendants, by their refusal to correct or to allow the Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property and have taken the same without paying just compensation therefor.

Wherefore Plaintiff prays that this Honorable Court assess Plaintiff's damages and award to Plaintiff just compensation for the taking of his said property and depriving him of all beneficial use thereof from 1961 to the present and award him such other and further relief as to this Court shall seem meet and just.

By his attorneys,
DiSandro-Smith & Associates,
P.C., Inc.

/s/ Z. Hershel Smith
Z. Hershel Smith
Suite 402 The Packet Building
155 South Main Street
Providence, RI 02903
(401) 274-7900

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, Sc.		SUPERIOR COURT
ANTHONY PALAZZOLO	)	
	)	
vs.	)	WC/88-0297
STATE OF RHODE	)	
ISLAND AND COASTAL	)	
RESOURCES	)	
MANAGEMENT	)	
COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 18 & 19, 1997

NON-JURY TRIAL-VOLUME 1 OF 4

Grover John Fugate

* * *

[170] A The application in 1983 involves an extensive amount of fill because it indicates that the elevation is going to be brought up to the six foot – six and a half foot mark. The '85 application indicates again that there is going to be a substantial amount of fill wetlands, but there is no elevational point.

* * *

[171] A Substantially in terms of the impact to the area, it would be the same, provided the extent was the same.

Q Let me ask you about the location of the fill on the area in question. With respect to the second application, the beach club application, would the fill have been

confined towards the Atlantic Avenue, or that is to say, southern end of the property?

A No. The fill was proposed to be towards the pond's edge.

Q Okay.

A It was obvious that the beach club wanted to locate on the pond, and therefore the major portion of that fill was to be located towards the northern end of the site.

Q Were these plans adequate for the Coastal Council's purposes? And, if not, in what respects not?

A For an application at that time for a beach club facility, again, it would have invoked a series of [172] sections under the plan, many of them very similar to the '83 application. For instance, there was the variance sections because there were obviously variances that would be required, so they would have to address the various burdens of proof under 120 because of the filling of the coastal wetlands and the filling of – and work within the tidal water area that probably would have required – I know it would have required a special exception. So those burdens would have to have been addressed. Section 140, Section 150, the buffer variances again, 200.2, which is the Type II waters, policies concerns would have to be addressed. 210.2, which is –

Q Is that 210.2?

A 210.2, which is the aerial section; 210.3, which is the coastal wetland section; and 300.1, 300.2, which is filling and grading on a coastal feature; 300.3 for commercial activity. And again, because there were – commercial

activity was invoked, we would need local approvals for all that to assume that was properly zoned and that met all the local building standards, fire hazard codes, all that.

Also, ISDS usually requires a permit for the placement of port-a-johns in these areas, and they usually require a maintenance plan and mitigation plan [173] because this is a velocity zone under the National Flood Insurance Program under FEMA.

This is a flood hazard zone with a base flood elevation of approximately fifteen feet which means that those outhouses in a storm surge would end up in the pond or on somebody's property on the backside, so it would require a mitigation plan for removal of those structures in the event of a storm or those types of things.

They would also require, if there is a drainage area here, it's unclear whether there are outfalls or anything else from this. But if there were, they were required to address the burdens under 300.6. And because they are invoking work below the tidal water and filling up below the tidal water, it would invoke the 310 provision, which again invokes the prerequisites of an Army Corps permit under Section 10, 404, and then the State water quality certification under 401, and also 330.

Because this plan came in after the adoption of the sand plan, which is the special management plan for the state of that region there which I developed for already degraded areas where we are trying to restore water quality, it would also have to address the burdens under the sand plan, and that was adopted at that time.

* * *

[175] A There is upland portions to the site, and there was at the time of the application based on aerial photo analysis.

Q What do you mean by upland?

A That portion of area above the mean high water mark is usually substantially dry, except for extreme coastal storms.

Q Now, I'm familiar with zoning practice, and I know the terms of variance and special exception with respect to zoning practice. Do those two words have the same meaning?

A I think they are probably reverse.

Q At the Coastal Council they are reversed?

A I think in terms of the burdens, a special exception is a tougher burden to meet than a variance.

Q At the Coastal Council?

A At the Coastal Council.

Q But in general zoning practice, it's the opposite?

A I believe so.

Q Okay. With respect to the development of the upland portions of the parcel, or the area in question in this [176] case, which of those standards would have applied in 1983 with respect to the plaintiff?

A For the upland portions, it's a variance.

Q And how about in 1985?

A Again, in 1985 the plan did not change. It would have been a variance.

Q It would be a variance today as a matter of fact, right?

A That's correct.

Q Did Mr. Palazzolo ever submit a plan that was restricted to the upland portions of the property of the area?

A There was no record of such a plan.

Q Ever?

A Ever.

Q Do the upland portions of the area in question in this case contain or comprise sufficient square footage such that one could fit the footprint of a house?

A Provided that a septic system of suitable design, yes, I think you could probably fit a residential structure on that site.

Q But that was never applied for?

A No.

Q Oh, I've heard a lot about the need for a public purpose or a compelling public purpose from Mr. Webster. To what extent does that standard apply to a variance?

A It doesn't apply to a variance. It applies to a special [177] exception.

* * *

[187] A Between '88 and '92, the development patterns on the Atlantic Avenue portion of that barrier for the northern side of Atlantic Avenue are confined pretty well exclusively to the upland portion or the dry land portion that immediately abuts the northern side of Atlantic Avenue.

* * *

[188] A The area in 1986, again, the development that has occurred in that area, except for two remnant structures or several remnant structures that predated to Council, has been all along the dry land area immediately abutting Atlantic Avenue on the north side.

* * *

[190] Q With respect to your testimony that there is an upland area on the location in question in this case, which if an ISDS system were technologically feasible would be permitted by the Council today under variance, is the existence of such an area borne out by the '92 photograph?

A Yes.

Q And is the existence – that's all right, you don't have to point it out.

A I was going to say why the upper upland portions that we are aware of exists at the road that abuts the pond. There may, and again, because we don't have an accurate or detailed survey, there may be other upland portions that are immediately adjacent to Atlantic Avenue, but that can't be determined.

Q Immediately adjacent, or immediately adjacent to the lots which are immediately adjacent?

A Well, immediately adjacent to the lots.

Q That are in turn immediately adjacent to the Atlantic –?

[191] A Right where on the lots that are immediately adjacent to Atlantic Avenue.

Q And is the existence of such an area borne out by the 1988 photograph?

A Yes.

Q Okay. And is the existence of such an area borne out by your actual visits to the site this year?

A Yes.

* * *

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

WASHINGTON, Sc. SUPERIOR COURT

ANTHONY PALAZZOLO	)	
	)	
VS.	)	WC/88-0297
STATE OF RHODE ISLAND	)	
AND COASTAL RESOURCES	)	
MANAGEMENT COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 20 & 23, 1997

NON-JURY TRIAL – VOLUME 2 OF 4

Grover John Fugate

[199] Q Okay. Now, yesterday you indicated that there was some upland on my client's property.

A There is – let me put this way, there has never been a proper survey submitted in any of these applications. Judging from the documents that we have in trying to estimate the area, it appears that there is upland in those – there is a small portion of upland.

Q All right. Would it be fair to say that that small portion of upland is further south towards Atlantic Avenue as opposed to further north towards the pond?

A The upland that I am thinking of is a small area at the turnaround at the terminus of Shore Gardens Road which is at the northern end of the site.

Q Where the car turnaround is on the plans?

A Yes.

Q That's the only upland?

A The back shore, again, because I am not sure where the [200] back property line is, I can't determine whether there is upland present there or not.

* * *

[210] Q So we can put a house on where it appears to be lot number twenty?

A Or somewhere around there. There are –

Q Twenty or nineteen?

A Somewhere in this area here. It's difficult to pin down. There may also be, if I can just look at this, there may be some upland area on the backside of 80 through 75.

Q So you are saying it's theoretically possible we can put one house on Lot 20, and, depending upon where the coastal feature goes, perhaps a house up in the area of Lot 80 or 79?

A Or one – or I don't know how many.

* * *

[211] Q All right. Well, for the purposes of this discussion I'd like you to assume that those are the only two permitted uses under the Westerly zoning ordinance. Now, you've indicated that there is a potential that we can build on two, perhaps three, perhaps four of the lots; correct?

A Perhaps.

Q Perhaps. So we have 76 lots – 74 lots here. What about the other 70? What uses can my client put his property? What can he do with that property? What productive use can he have?

* * *

[212] Q No. I want to know in your opinion, you are the executive director, is there any set of circumstances that you can think of where my client would be able to go in and get approval to put 69 residential homes on [213] that property?

A 69?

Q Correct. I'm assuming that he will be able to use five pursuant to our previous discussion.

A No, I don't think the Council would approve 69

Q And the reason for that is because to do a residential home, you need to put fill in there?

A Correct.

Q Now, you indicated to the Court yesterday, Grover, that my client, that there was no evidence that a subdivision was going to be there, right?

A There was no request for a subdivision.

Q Well, you didn't need a request. We had a subdivision; we needed to put fill to put homes on it, right?

A Typically, when an application was coming in that time for residential development, they would ask to be able to build and construct X number of lots. They would have to put road systems in, they would have to put water lines in, they would have to put ISDS's. They all have to – they are applied for at that time.

The Council, at that time, consistently asked for the application to come in in one fashion. They resisted phased approach to development because the Council needed to get the whole picture in order to look at the project in its entirety to make a proper [214] assessment of whether the first stage was even proper.

Q But my client did tell you that he is applying to put fill into the property for the purposes of allowing a use under the zoning ordinance, did he not?

A He said whatever the zoning would allow.

Q That's right. And, as a matter of fact, page one of his application, handwritten, he states, it says: "Proposal to restore property line and protect and prevent further erosion, and to fill property to Elevation 6.5; to prepare property for uses as designated by zoning regulation." So he told you that; correct?

A All I can tell you, Mr. Webster, is under review of the record, when your client was cross-examined and asked whether he was going to put a residential development on it, he was extremely vague as to whether he was going to put any at all on it.

* * *

John P. Caito

* * *

[274] A. Once the muck is removed, I estimated a total depth of eight feet of fill would be required to properly stabilize the site for the construction of residential dwellings on foundations, as well as the installation of some type of on-site sewerage disposal system.

* * *

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

WASHINGTON, Sc. SUPERIOR COURT

ANTHONY PALAZZOLO	)	
	)	
VS.	)	WC/88-0297
STATE OF RHODE ISLAND	)	
AND COASTAL RESOURCES	)	
MANAGEMENT COUNCIL	)	

HEARD BEFORE MR. JUSTICE FRANK J. WILLIAMS

ON JUNE 25 & 26, 1997

NON-JURY TRIAL - VOLUME 4 OF 4

Steven M. Clarke

* * *

[610] A All that I can tell you is that based on my discussions with the two aforementioned gentlemen, that there - and my review of the site, the site has two uplands areas. One upland area is located at the end, at the end of Lots 127 and 128. You see Elevations 3, 3.3. That's upland.

There is also an island in the middle right down in this area on Lot 88 or a little bit farther west. There is also a freshwater wetland, not a coastal wetland, but freshwater wetland that is located in the area of behind Lot 68 to 70 to 71. In discussions with the two gentlemen, it seemed that a - that an ISDS system -

MR. WEBSTER: I'm going to object to the hearsay coming in with regard to Mr. Chateauneuf, not with

regard to Mr. Reis. Mr. Reis is an agent of a party opponent, and I'm not objecting to that. But any conversations with Mr. Chateauneuf, who is not a party opponent, I object to.

MR. RUBIN: I believe the witness phrased his answer, "as a result of the conversation with."

[611] THE COURT: And also zone review of the site. You may answer.

A And giving the changing times of different alternate ISDS systems, which are available today that might have not been available ten years ago, that an ISDS system should be able to be designed and approved in the area of Lots 127, 128, and a potential one or two ISDS systems should be able to be constructed behind 68 and 71 in that area.

The access to Lots 127, 128 is right down the gravel road. The access to Lots 68, 69, 70 is, once again, after these homes, the two homes that are built here, there would have to be a road extension and access gained into that area. All I can tell you is that Mr. Reis, when I talked to him the other day, when I explained the situation about a freshwater wetland and possibly it's not in the coastal feature, he thought that that might be a site that will be acceptable.

I have constructed on at least two occasions ISDS systems in a freshwater wetland when it abutted a coastal feature, and received approvals.

Q Now, you would require variances for that both with respect to ISDS and with respect to CRMC; isn't that correct?

A The 127, 128 is conceivable that what we'd be looking [612] for is an alternate type of design system that they have now. They have the new eco system. The new eco system allows you to downsize your leaching area, things along that line. With respect to behind 68 through 71, 72 area, yes, we would be looking for a variance. And the island that's out in the middle is just unreachable, nonaccessible.

Q Now, with respect to getting such a variance with respect to both locations, you would need a variance from ISDS; correct?

A That's correct. That's the reason I talked to Mr. Chateauneuf before I was going to take the stand.

Q All right. But you feel it would be realistic to expect such a variance?

A I felt that they were realistic to apply for those locations. I then discussed it with Mr. Chateauneuf, and he gave me supporting information saying that it made sense.

Q Do you believe it would be realistic to expect variances for a subdivision of the magnitude, the density, and the number of lots of the proposal that you came up with based on Mr. Caito's assumptions?

MR. WEBSTER: Objection, your Honor.

THE COURT: Read back the question.

(Question read)

[613] THE WITNESS: No, I don't believe so.

THE COURT: No, there is an objection. I have to rule on it. But I'll allow it. You have to answer it.

A I don't believe so. It's just – just way too aggressive of the development, and even that's based on Mr. Caito's 74 lots. And I scaled it back to 50 lots, which I thought could anyway be achievable to even go forward with, and that just seems way too many. Entire subdivision of variances.

MR. RUBIN: If I may confer for a moment.

(Pause)

Q Did you hear Mr. Caito testify at his deposition or read in his deposition testimony any testimony with respect to the use of alternative systems such as privies?

A Yes.

Q Okay. And, in fact, did you hear Mr. Webster elicit testimony with respect to such alternative systems on his cross-examination of Rush Chateauneuf?

A Yes, I did.

Q Okay. What is a privy?

A A privy, and I – I thought the day that I heard the question was a little bit – but a privy, I looked it up yesterday, is a latrine or outhouse. And it's kind of comical when you think about it, that that would be considered as an alternate here. Because if I've got [614] this straight, I'm going to build this house seven feet in the air. At about two in the morning I get up, I'll go down the stairs, walk out in back. The outhouse is another structure. I'll go up a ladder, and I'll go into the outhouse and

then walk back out. I just don't think it's that type of a system that would be acceptable to this area.

THE COURT: Especially in the middle of a hurricane.

* * *

Thomas S. Andolfo

* * *

[685] Q Going back to the multi lot residential single family subdivision model, how would the use of alternative unconventional systems, such as a privy, have affected market value?

A I can only say that in my opinion it would have a negative impact on value, just for the very fact of what a privy is and how you have to access it. In my opinion, no one is going to buy a lot for $150,000 if you have to, you know, climb out of your house and climb upstairs to an outhouse.

* * *

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

NEDOD-P 23 November 1971

Mr. Anthony Palazzolo
275 High Street
Westerly, Rhode Island 02891

Dear Mr. Palazzolo:

This refers to your revised application of March 29, 1962, for a Federal permit to perform construction and dredging operations in Winnapaug Pond in Westerly, Rhode Island.

In response to public notices reissued September 14, 1971, we have received thirty-two letters, including two petitions containing about sixty-six signatures. All letters and petitions express objection to the proposed work. These objections are based on the contention that the work would have a detrimental impact on aesthetics, water quality and existing fish and wildlife resources in the Pond, and would increase vehicular and boat traffic in the area.

In addition to the above noted objections, we have received a letter from the Regional Coordinator, Northeast Region, United States Department of Interior relative to your proposal. A copy of this letter is inclosed [sic]. That agency has reviewed your application and has recommended that the permit be denied. A separate review of the proposed work was undertaken by our Environmental Resources Section. It is concluded that the information contained in this review supports the recommendation of the Department of Interior.

In view of this recommendation, his office will not grant a Federal permit unless you can refute the information and views of the Department of Interior.

I welcome any comments or questions you may have. However, I must advise you that unless I hear from you within 30 calendar days, I will assume that you do not wish to discuss the issues further in which case I will recommend that our application be finally denied.

It should be borne in mind that should you resolve all the objections including those of the Department of Interior, this office cannot consider granting the Federal permit until the proper State Assent has been obtained. In this connection, it is noted that the Rhode Island Department of Natural Resources has declared the State Assent issued to you on May 19, 1971, null and void.

Again, if you have any questions pertaining to this matter, please do not hesitate to call me.

Sincerely yours,

F.W. MOEHLE
Chief, Permits Branch
Operations Division

1 Incl
As Stated

CF: Raymond Surdut
Counsellor at Law
Providence, Rhode Island

Charles Replinger
R. I. Div. of Coastal Resources
83 Park St.
Providence, R.I.

Opers Div File-Permits

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

INTER-OFFICE MEMO

TO: James Beattie, Chief

DEPT: Division of Coastal Resources

DATE: August 24, 1983

FROM: John M. Cronan, Chief [illegible]

DEPT: Fish & Wildlife

SUBJECT: Anthony Palazzolo application
file number 83-3-55

The Division of Fish & Wildlife has reviewed the above application and frankly find it to be one of the most blatant proposals regarding the destruction of coastal wetlands that we have ever seen. Jim Parkhurst's field report concerning this application lists most of our concerns over this proposal. The proposed filling of the saltmarsh will have many negative effects on finfish, shellfish and wildlife and again the Division is unalterably opposed to this proposal.

[LOGO]

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

COASTAL RESOURCES MANAGEMENT COUNCIL
60 Davis Street
Providence, R.I. 02908

RECOMMENDATION OF SUBCOMMITTEE

Petition of: **ANTHONY PALAZZOLO**
275 High Street
Westerly, R.I. 02891

Docket Number: **83-3-55**

Applicant, ANTHONY PALAZZOLO, applied to the Coastal Resources Management Council to construct and maintain a pile bulkhead and place fill below Mean High Water [MHW] on Lot Numbers 3 thru 14, 17 thru 22, and 75 thru 80, Plat 155, off Atlantic Avenue, Westerly, Rhode Island, with specifications filed by applicant in Notes, 1, 2, 3, 4, filed with the application.

A duly appointed Subcommittee held a public hearing pursuant to the Administrative Procedures Act on August 18, 1983, in the Town Hall, High Street, Westerly, Rhode Island. At that time, evidence was submitted by applicant and other interested parties. Further evidence was submitted by staff members of the Coastal Resources Management Council [CRMC] and by other State agencies, all of which was incorporated into the record. All evidence so submitted to the Council pursuant to this application whether it be by interested parties, the applicant, or the Council itself through its own staff members and other State agencies, has been made available and is available for all interested parties at the offices of the

Coastal Resources Management Council, 60 Davis Street, Providence, Rhode Island.

FINDINGS OF FACT:

1. The applicant proposes to construct a wooden bulkhead type structure approximately 340' long along a portion of the southern shoreline of Winnepaug Pond. The proposed bulkhead retainer consists of a single line of horizontal poles [unknown diameter] connected to vertical poles spaced 20' apart. The vertical poles shall be dug to -4' MLW. The top of the horizontal retainers will be at existing grade [approximately 2.5' MLW].

Also, the area behind the bulkhead, approximately 18 acres of salt marsh is proposed to be filled to an approximate elevation of 6.5' MLW (5' MHW). Existing elevations of the area range from 0'-5' MHW with marsh elevations of 0'-2' MHW. Proposed embankments along property lines are to be graded to approximately 1 vert: 1 horiz. slopes. The applicant proposed to establish a 50' "buffer" upland of the proposed bulkhead. This "buffer" will consist of a 30' level area and then slope upland, 1 vert: 5 horiz. to an elevation of approximately 5' MHW. A previously filled gravel road approximately 50' x 860' runs through the eastern portion of the property. Marsh existing on both sides of this road is to be filled. According to text submitted, "the final grade and contour, [of fill] may be altered slightly, to allow for surface water management."

2. An extensive coastal wetlands system exists on the property. A wide strip of wetlands [700' - 1000'] borders Atlantic Avenue on the south and the southern shore of

Winnapaug Pond to the north. Misquito ditches, in generally good condition, intermingle throughout the area and allow tidal waters to fluctuate more freely. Ponding in small pools also occurs throughout the wetlands. As well as being a natural wildlife habitat, the wetlands system acts as a buffer to flooding, absorbs runoff, and filters pollutants in runoff waters entering Winnapaug Pond.

A single dwelling exists near the shore to the west, on or adjacent to the applicant's property. A small island – like mound exists to the west with elevations of 2' - 5' MHW. A previously filled gravel road [elev. 1' - 2' MHW] runs from Atlantic Avenue and terminates in a small turn around at the shore of the pond. This turn around is the site of some local littering and dumping. A short and narrow pebble beach is just below the turn around area. No significant erosion was noted along the shoreline and the area is well vegetated. There is, however, shoaling along he southern shore of the pond which would make it difficult for boating in the near shore areas. Wave action on the pond is low.

The USDA "Soil Survey of Rhode Island" classifies the soils in this area as "Mk. Matunuck mucky peet," characterized by level, poorly drained soils in tidal marshes. Permeability is rapid to very rapid and water capacity is low. "The daily tidal flooding and a high salt content make this soil unsuitable for most uses except as habitat for saltwater tolerant wildlife." The soil survey also states that this material is unsuitable for sanitary facilities and construction materials such as road fill or fill in general.

3. Drawings submitted and on file at our office are vague and inadequate for a project of this size and nature. This fact was brought to applicant's attention prior to hearing and has not been addressed by applicant. As a result, the property lines are vague and not specific.

4. Applicant proposes to construct a 1340 foot pole barrier dug into shoreline embankment.

5. Proposal to fill property to elevation 6.5' MLW includes the filling of approximately 18 acres of salt marsh and tidal waters. Final grades and contours have not been determined.

6. Impacts from runoff, flooding and biological concerns have not been addressed by applicant.

7. The effect of 1340 feet of horizontal poles along the shoreline and through tidal waters and wetlands were not addressed by the applicant.

8. It is apparent from staff reports that the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond. Such impacts were not addressed by the applicant.

9. Applicant has not demonstrated by a fair preponderance of evidence that the proposed development as submitted will not:

a. Conflict with the Federal & State approved Rhode Island Coastal Resources Management Plan.

b. Make the area unsuitable for any uses or activities to which it is allocated by a CRMC Plan or Program.

c. Significantly damage the environment of the coastal region.

After deliberation upon the entire record and all evidence submitted, the Subcommittee recommends to the full Council that this application be denied.

Respectfully submitted,

/s/ Joseph Turco
Joseph Turco

/s/ Barbara Colt
Barbara Colt

/s/ Donald Brown
Donald Brown

EXHIBIT: 10-FULL

RHODE ISLAND COASTAL RESOURCES MANAGEMENT COUNCIL
BIOLOGIST'S FIELD REPORT

Date of Preparation July 15, 1985
File No. 85-1-33
Date of Application March 21, 1985

Street Shore Gardens off Atlantic Avenue
City/Town WESTERLY

Owners Name Palazzolo, Anthony
Plat No. 155
Lot No. (not indicated)

Address 275 High Street, Westerly RI 02891
Telephone No.

Contractor/Engineer Wes Grant III, PE (Environmental Consultants, Inc., W. Kingston RI)

Names of Adjacent Waterways WINNAPAUG POND

Nearest Utility Pole #184

Project Type: fill coastal and contiguous wetland adjacent to Winnapaug Pond with clean bank run gravel to establish a private beach club for seasonal use; there will be parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbeque pits and trash receptacles upon the filled area.

Preapplication __ CRMC Permit Application xx

Review for other agency __ (specify US Army Corps of Engineers: Sect. 404)

Complaint __ (specify _____

Project completion follow up __

Name(s) of investigator(s)	Inspection	
Irene Kenenski	Date 4/18/85	Time 3:30 pm
_____	Date 4/30/85	Time 11:00 am
_____	Date 5/15/85	Time approx. 12:30 pm

1. Ecosystem Types

Shoreline Type: cliff __ scarp __ ledge __ boulder beach __ sand beach __ mudflat xx salt marsh xx brackish marsh __ freshwater __ cobble beach __ other back dune formations (Atlantic Barrier)

Water type: Narragansett Bay (specify where) Other estuary (specify) __ Sounds __ Salt pond WINNAPAUG Freshwater pond __ Stream or river (specify) __

Inland Features: Dune xx Woodland __ Open land xx

Comments: The site is along south shores of Winnapaug Pond, to the north side of Atlantic Avenue; approx. 5000 ft. west of the Weekapaug Breachway and

approx. 1000 ft. north of Atlantic Beach (Block Island Sound); USGS Watch Hill quadrangle.

2. Salt Marsh Vegetation Present:

Spartina alterniflora xx Spartina patens xx Spartina pectinata __ Juncus gerardi xx Limonium carolinianum __ Distichlis spicata xx Salicornia spp. xx Phragmites australis __ Typa angustifolia __ Typha latifolia __ Eleocharis rostellata __ Scirpus americanus __ Iva fructescens __ Agrostis palustris __ Hierochloe odorata __ Elymus virginicus __ Scirpus spp. __ Other _____

3. Significant Environmental Features (biological, hydrological, geological)

The site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond. An estimation of total continuous salt marsh area at south shores of the pond is 220± acres, with an additional 100± acres at southwest shores. That this wetland complex is large, continuous and has remained relatively non-fragmented despite development pressures in the area is important in its value assessment.

In the review of this application, the coastal feature is this salt marsh and the inland edge of the coastal feature is the landward (south) wetland boundary.

Winnapaug Pond is 446 acres in size with a mean depth of less than 5 feet and high salinity (26-34 ppt); it is breached at the east end and shoaling is steady at the east end due to sand from the breachway; the immediate surroundings of Winnapaug Pond are prone to coastal flooding (Collins 1985).

Salt marsh is represented by *S. alterniflora* in subtidal areas and high marsh (intertidal) is predominantly *S. patens and D. spicata*. The marsh is interspersed with tidal pools, pannes and mosquito ditches. A gravel road runs along the east side of the site, terminating at a small upland island vegetated with mostly bayberry (*Myrica pennsylvania*) shrubs and with a border of cobble beach at the shoreline. There is a small turn-around at the end of this road; however, no form of launching ramp was observed here, as is indicated on the site plan submitted for application.

Barrier formations are present south of the site; the Atlantic Beach is within 1000 ft. to the south.

Soils of the site are surveyed Matunuck mucky peat, found in tidal marshes and subject to tidal inundation; the daily flooding and high salt content make this soil unsuitable for most uses except as habitat for saltwater-tolerant wildlife (USDA/SCS Soil Survey of RI, 1981). There is concern as to the ability of wetland soil to sustain proposed fill of this magnitude – potential subsidence of the fill may necessitate additional filling in the future. There is question whether the fill can be contained over time, with the possibility for sedimentation to pond waters by overwash or due to scouring at the toe.

Features of the salt marsh contributing to value assessment for habitat and productivity are:

- Open water interspersion, in providing refuge and/or feeding areas for larval and juvenile finfish and shellfish and for migratory waterfowl and wading birds; mosquito ditching enhances edge through the high marsh areas, enables access of fauna to cover areas and permits exchange of nutrient/waste products.

- Size enhances habitat value in providing space requirements and amounts of food and cover available; total area of production.
- Length of shoreline relative to total wetland area increases edge and the interface available for nutrient exchange.
- A tidal water regime is efficient in nutrient import/export (Odum. 1961)
- Net primary productivity of salt marsh emergent vegetation is known to be the highest of natural systems (Nixon, 1982; US Dept. of Transportation, 1982).
- Physiographic location of the wetland suggests heavy wildlife use due to proximity to major open water bodies (coastal pond, ocean) and the diverse surrounding habitat types.

Values of the marsh in addition to habitat and productivity are:

Natural shoreline protection: the abatement of storm surge from both the ocean side and the pond.

Sediment trapping and marsh accretion.

Flood storage.

Nutrient retention in an area subject to bacterial contamination and other runoff associated with development.

Aesthetics: landscape diversity of the coastal zone.

There are endangered/threatened species (plant and avian) inventoried for this marsh within the immediate vicinity of the proposal (ref. RIDEM Natural Heritage Program). The pond is a RIDEM Shellfish Management

Area (see item #4 of this report) and is a designated Area for Preservation & Restoration (APR) under the Coastal Zone Management Act of 1972.

4. Existing land and water uses (note degree of development):

Land uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings – impacts are at present associated with development of buffering back dune areas to the north side of Atlantic Avenue. Winnapaug Pond is presently under study for inclusion with the CRMC SAM Plan – the salt marsh at the south shore of the pond is proposed to be designated an Area of Critical Concern. Water use is Type 2, low-intensity. The pond is a RIDEM Shellfish Mgt. Area, supporting populations of eastern oyster (*Crassostrea virginica*), bay scallop (*Argopecten irradians*) and soft clam (*Mya arenaria*) ref. RI Shellfish Atlas, 1974. The pond also supports a recreational harvest of quahogs (*Mercenaria mercenaria*) and blue crabs, mussels, razor clams and horseshoe crabs are also found; the recreational finfish resources include tautog, bluefish, winter flounder, striped bass and [there is*] a commercial eel trap fishery (Collins, 1985).

---

* Bracketed material handwritten.

5. Applicability to CRMP (June 18, 1983):

Area of jurisdiction per Sect. 200.2, 210.3 of the CRMP; activity under jurisdiction per Sect. 130, 300.2, 300.3, 300.6 [and 330.*]

REFERENCES:

Collins, C.A. 1985. Extension of the Salt Ponds Special Area Management Plan to Winnapaug (Brightman's) and Maschaug Ponds and theri [sic] Watersheds. Ch. 3: Water Quality; draft rept. Prepared for Coastal Resources Management Council and Coastal Resources Center. 35 pp.

Nixon, S.W. 1982. The Ecology of New England High Salt Marshes: A Community Profile. US Fish & Wildl. Serv., Washington, D.C. FWS/OBS-81/55. 70 pp.

Odum, E.P. 1961. The Role of Tidal Marshes in Estuarine Production. *In*: NY State Conservationist, June-July. 4 pp.

US Dept. of Transportation. 1983. A Method for Wetland Functional Assessment. Vol. II. Offices of Research & Development, Washington, D.C. FHWA-IP-82-24. 134 pp.

6. Comments on adjacent activities under CRMC jurisdiction:

See violation reports from IJKenenski to CRMC dated 3/19 and 3/22/85 documenting illegal fill encroachment at the landward boundary of this salt marsh, immediately sw. of this site.

---

* Bracketed material handwritten.

[SEE FILES (83-3-55, IN THE NAME PALAZZOLO) FOR PREVIOUS PROPOSAL TO FILL THIS SAME SALT MARSH; THAT APPLICATION WAS DENIED.*]

7. Comments on work in progress:

No work in progress.

8. Samples taken, tests performed (note specific location, tide, weather, etc.)

Vegetative samples taken for positive identification; estimate of acres of fill proposed was made from the site plan submitted; the size of the entire wetland complex and other site dimensions were estimated from 1980 B&W aerial prints.

9. Photographs taken (describe):

No photos.

10. Person (s) present other than investigator(s):

4/30/85: Linda Steere, staff biologist
Arthur Ganz, Sr. Marine Biologist (RIDEM Div. Fish & Wildlife)

5/15/85: Ken Anderson, staff engineer

11. Summary of information and views exchanged:

A. Ganz accompanied staff to the site on 4/30/85 in relation to the memorandum of objection to this proposal, submitted to J. Cronan, Chief (Div. Fish & Wildlife) from A. Ganz, dated 4/27/85.

---

* Bracketed material handwritten.

12. Recommendations:

This proposal to fill salt marsh at the south shores of Winnapaug Pond for the purpose of establishing a private beach club is in conflict with the following criteria of the *CRMP*:

Sect. 130(A)(1): The proposal must meet the criteria for a Special Exception, whereby the activity serves "a compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests."

Sect. 150: The applicant has proposed a 50-foot "buffer" from the water's edge to the edge of fill. To establish a "buffer" in this case is technically irrelevant in that the salt marsh (coastal feature) itself is proposed to be filled.

Sect. 210.3(C)(1): "The Council's goal is to preserve, and where possible, restore coastal wetlands."

Sect. 210.3(C)(4): "Alterations to salt marshes . . . abutting Type 2 waters are prohibited except for minor disturbances associated with . . . residential docks and walkways . . . and . . . approved construction or repair of structural shoreline protection facilities."

Sect. 300.2(B)(1): " . . . unless the primary purpose of the alternative is to preserve or engance [sic] the feature as a conservation area or buffer against storms filling . . . is prohibited on . . . coastal wetlands . . . adjacent to Type 1 and 2 waters."

Sect. 300.2(B)(2): "Filling . . . on coastal wetlands is prohibited adjacent to Type 1 and 2 waters . . . unless a consequence of an approved mosquito control project."

Sect. 330(A)(1): "The primary goal of all Council efforts to preserve, protect and, where possible, restore the scenic value of the coastal region is to retain visual diversity and often unique visual character of the Rhode Island coast . . . "

From the standpoint of impacts on biological resources, this proposal represents *direct* loss of salt marsh and its inherent values:

- Loss of wildlife/fisheries habitat.
- Loss of productivity.
- Loss of diversity, in that the marsh functions in overall estuarine system stability, considered as a single production unit (Odum, 1961).
- Loss of nutrient retention – the mitigation of contaminant/runoff impacts to tidal waters of the pond.
- Loss of natural shoreline protection.
- Loss of flood storage, particularly in an area prone to coastal flooding (Collins, 1985).
- Loss of aesthetic value.

In addition to direct losses, the proposed filling of salt marsh presents potential *indirect* impacts: noise and other disturbance factors to wildlife and fish resources associated with adjacent pond/marsh habitat; effects on functional wetland areas adjacent to the site in natural shoreline protection, in flood storage and in circulation;

potential subsidence of fill over time, with resultant sedimentation to pond waters.

As detailed in item #3 and 4 of this report, the site is a RIDEM Shellfish Management Area, a designated Area for Preservation & Restoration under the CZM Act of 1972, and habitat for endangered/threatened species within the immediate vicinity (RIDEM Natural Heritage Program).

It is emphasized that the wetland values are tangible public benefits proposed to be lost with a project intended for private use. According to *CRMP* Sect. 130, the applicant must demonstrate that the project serves "a compelling public purpose . . . and that there is no reasonable alternative means of, or location for, serving the compelling public purpose cited." The environmental losses incurred by alteration must be weighed against any such "compelling public purpose," should it be so demonstrated.

Sigature(s) [sic] Irene Kenenski Date 7/16/85

DEPARTMENT OF THE ARMY
NEW ENGLAND DIVISION, CORP'S OF ENGINEERS
424 TRAPELO ROAD
Waltham, Massachusetts 02254

[SEAL] REPLY TO
ATTENTION OF

July 17, 1985

Regulatory Branch
NEDOD-R-26

Mr. Anthony Pallazzolo [sic]
275 High Street
Westerly, Rhode Island 02891

Dear Mr. Pallazzolo [sic]:

We understand you intend to fill a tidal wetland adjacent to Winnpaug Pond at Shore Gardens off Atlantic Avenue in Westerly, Rhode Island. The purpose is to establish a beach club.

Let me briefly explain Corps jurisdiction. A Corps of Engineers permit is required for all work beyond mean high water in navigable waters of the United States under Section 10 of the River and Harbor Act of 1899. In New England, for purposes of Section 10, navigable waters of the United States are those subject to the ebb and flow of the tide and rivers, lakes and other waters that are used to transport interstate or foreign commerce. Permits are also required under Section 404 of the Clean Water Act for those activities involving the discharge of dredged or fill material in all waters of the United States, including not only navigable waters of the United States, but also

inland rivers, lakes, and streams, and their adjacent wetlands. On the coastline our jurisdiction under the Clean Water Act extends landward to the extreme high tide line or to the landward limit of any wetlands.

Therefore, please apply to this office for a permit to perform this work. The application must be submitted on EWG form 4345. The form and samples of the necessary drawings are enclosed.

If you have any questions on this matter, please contact me at 617-647-8495 or use our toll free-number 1-800-343-4789.

Sincerely,

Marita Yoder
Project Manager
Regulatory Branch
Operations Divisions

Enclosure

Copies Furnished:
See attached sheet
RI CRMC
60 Davis Street
Providence, Rhode Island 02908

Office of Selectmen
Town Hall
High Street
Westerly, Rhode Island 02891

EXHIBIT: 9 – full

DIVISION OF COASTAL RESOURCES – ENGINEER'S FIELD REPORT
TYPE OF REVIEW: A.B.[P.] [Circle One]: ___ FILE NUMBER: 85-1-33

Name: ANTHONY PALAZZOLO

Plat: 155

City/Town: WESTERLY

Lot[s]: _____

Mailing Address: 275 HIGH STREET, WESTERLY RI, 02891

Designer, Address: ENVIRONMENTAL CONSULTANTS; INC., W. KINGSTON, RI

Location: Pole: SHORE GARDENS OFF ATLANTIC AVENUE

Waterway: WINNAPAUG POND

Barrier Beach: ATLANTIC BEACH

Type: DEVELOPED

Proposal: TO FILL COASTAL AND CONTIGUOUS WETLAND ADJACENT TO WINNAPAUG POND WITH CLEAN BANK RUN GRAVEL TO ESTABLISH A PRIVATE BEACH CLUB FOR SEASONAL USE. THERE WILL BE PARKING FOR 50 CARS WITH BOAT TRAILERS, A DUMPSTER, PORT-A-JOHNS, PICNIC TABLES, BARBEQUE PITS OF CONCRETE AND OTHER TRASH RECEPTICLES [sic] UPON THE FILLED AREA (THIS APPLICATION REQUIRES A SPECIAL EXCEPTION UNDER RICRMP SECTION 130.

Inspector: K.W. ANDERSON

Inspector: _____

Date: 5/15/85

Date: _____

Time: 12:30 PM

Time: _____

Persons Present & Views Exchanged: I. KENENSKI (FISH AND WILDLIFE DIVISION BIOLOGIST). DISCUSSED PROGRAMMATIC CONCERNS.

Measurements, Samples, Tests Made: ROUGH AREA MEASUREMENTS TAKEN.

Photographs: NONE TAKEN.

Other Review Items Used [Maps, Charts, Etc.]: STAFF AERIALS, ETC.

Previous CRMC Actions for this Site: FILE NO. 83-3-55 (TO CONSTRUCT BULKHEAD AND MAINTAIN FILL.) WAS DENIED 5/4/83

Corroboration and Adequacy of Plans: ADEQUATE FOR STAFF REVIEW (SUPPLEMENTAL DETAIL OBTAINED INFIELD)

Permit Requirements:

DEM/ISOS: N/A

DEM/Land Resources, Freshwater: N/A

Local Building: N/A

Corps of Engineers: REQUIRED, NOT RECEIVED (PREVIOUSLY DENIED 1/27/[ILLEGIBLE]

Other Local, State, Federal: –

Significant Programmatic Characteristics [Erosion Zone, Etc.]: CRC DESIGNATED APR (AREA FOR PRESERVATION AND RESTORATION)

Public Infrastructure:

Adjacent Roads: ATLANTIC AVENUE

Public Water Service: YES

Public Sewer Service: N/A

Flood Zone Information:

Flood Zone	Base Flood Elevation [B.F.E.]	Wave Height Included?
Closest To Shore:		
V*	15' MSL	YES
—	_____	___
Furthest Inland:		
—	_____	___

B.F.E. is the 100 year intensity Storm Water Level.

Flood Zone at Building/Project Site: V BFE 15' MSL Wave Hgt. Included? YES

Classification of Project:

New Construction _____; Substantial Improvement _____; Accessory; _____

Non-Substantial Improvement: _____ Other: FILLING WETLANDS.

*PRELIMINARY – 12/3/84

Waterway Information:

1983 RICRMP Use Category:

Type 1. Conservation: _____

Type 2. Low Intensity: XX

Type 3. High Intensity Boating: _____

Type 4. Multipurpose: _____

Type 5. Commercial Recreational Harbors: _____

Type 6. Industrial Waterfront & Commercial Navigation Channels: _____

DEM Water Quality Classification: SA

Harbor, Channel Line Information: NOT PERTINENT

Riparian Line Information: NOT PROVIDED

Normal Wave Energy [Not Including Hurricane Events]:

Minimal [Large Wetlands, Small Ponds XX. Low [Fetch < 2 mi =] _____.

Moderate [Fetch 2 to 8 miles =] _____. High [Fetch > 8 mi =] _____.

Direction from which maximum normal fetch emanates: MINIMAL WITHIN POND.

General Waterway Classification & Other Pertinent Information: LARGE (446 ACRES ±) MICROTIDAL COASTAL LAGOON COMPLEX (AVERAGE DEPTH 4-5' ±) WITH EXTENSIVE SALT MARSH FRINGE OF VARIABLE WIDTH. POND IS FLUSHED BY NARROW (120' ± MINIMUM) AND SHALLOW STABILIZED TIDAL INLET. NORMAL TIDE RANGE: 2.6' PLUS 1.2' MOONTIDE SURGE.

Benthic Sediment Information: CONSIDERED COARSE GRAINED. SURFACE APPEARS TO BE SAND (BEACH

ORIGINATED) SUBSTRATE INCLUDING "RECENT" DEPOSITS ON FLOOD TIDAL DELTA.

Circulation & Flushing Information: LIMITED DUE TO DEPTH. (LATERAL ACCRETION OF THE ACTIVE DELTA LOBES FRONTING THE MARSH CONTINUES TO DECREASE DEPTHS WITHIN POND.

Existing Waterway Development & Uses [On Site & Surrounding]: WINNAPAUG POND SUPPORTS EXTENSIVE RECREATIONAL USE.

APPLICANT'S NAME: PALAZZOLO TOWN: WESTERLY

LOCATION: ADJ. SHORE GARDENS.

FILE NO: 85-1-37

MEMO: RECOMMENDATIONS:

(CIRCLE ONE)

ENGINEERING COMMENTS (CON'T.)

AS WELL AS BEING A NATURAL WILDLIFE HABITAT, THE WETLAND SYSTEM ACTS AS A BUFFER TO FLOODING AND PROVIDES A NATURAL POLLUTION AND RUNOFF CONTROL BUFFER FILLING SUCH AN EXTENSIVE AREA (11 + ACRES) OF THE FLOOD PLAIN MAY RESULT IN TIDE SURGE ELEVATION INCREASES AT OTHER LOCATIONS WITHIN THE POND. CONSIDERING THE 50 VEHICLE CAPACITY OF THE PROPOSED PARKING AREA, THE INTRODUCTION OF PETROLEUM BASED POLLUTANTS TO WITHIN A CLOSE PROXIMITY OF THE POND IS ALSO OF CONCERN OVERALL, THE PROPOSED APPLICATION APPEARS TO REPRESENT A SIGNIFICANT

POTENTIAL FOR INCREASED IMPACTS TO THE POND ECOSYSTEM.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:

_____

Coastal Feature Information:

Coastal Feature [s]: AN EXTENSIVE COASTAL WETLANDS SYSTEM 700-1000' WIDE BORDERING THE SOUTHERN SHORE OF WINNAPAUG POND. EXISTING ELEVATIONS OF THE AREA RANGE FROM 0-5' MHW WITH MARSH ELEVATIONS OF 0-2' MHW. A PREVIOUSLY FILLED GRAVEL ROAD (50' x 860' ±) RUNS THROUGH EASTERN PORTION OF PROPERTY.

Existing Shoreline Protection Facilities [On Site & Adjoining]: NONE IDENTIFIED.

Coastal Erosion Characteristics: THE SHORELINE FRONTING THE MARSH (WITHIN THE POND) APPEARS TO BE ACCRETING DUE TO THE MIGRATION OF SAND INTO THE POND VIA THE WEEKAPAUG INLET. (FLOOD-TIDAL DELTA DEPOSITION)

Lateral Access Characteristics: NO LATERAL ACCESS OBSTRUCTION NOTED.

Upland Information:

Backing Upland Feature [s] ¦Note Elevations]: 400-500' WIDE DEVELOPED BARRIER SPIT SYSTEM. ON SITE UPLAND ELEVATIONS ARE LESS THAN 6' MHW. ±

Existing Upland Development [On Site & Surrounding]: LIGHT DENSITY RESIDENTIAL (NORTH OF ATLANTIC AVENUE). A DENSE "STRING" OF RESIDENTIAL DWELLINGS EXIST ALONG SOUTHERN BACK DUNE AREA, SOUTH OF ATL. AVE.

Upland Drainage, Runoff, and Erosion Characteristics: THE EXTENSIVE SALTMARSH SYSTEM CURRENTLY PROVIDES A NATURAL RUNOFF CONTROL BUFFER. NO UPLAND EROSION CONCERN NOTED.

Soils Information [From Soil Survey of R.I., USDA SCS. Except As Noted]: Map Unit[s]: MATUNUCK MUCKY PEAT.

Hydrologic Groups [s]: A: High Infiltration Rate when thoroughly wet _____

B: Moderate . . . _____: C: Slow . . . _____: D: Very Slow . . . XX

Typical High Water Table Information: TIDAL MARSH SUBJECT TO TIDAL INUNDATION. (DAILY)

Glacial Geology:

Upland Till Plains _____.

CMA, & Block Island Moraine _____.

Narragansett Till Plains _____.

Outwash Deposits XX .

Other Pertinent R.I.S.S. Info/Suitabilities: NEARLY LEVEL, POORLY DRAINED. WATER IS PONDED IN SOME AREAS. RAPID TO VERY RAPID PERMEABILITY (RESTRICTED BY HIGH WATER TABLE AND TIDAL

FLOODING) – UNSUITABLE FOR MOST USES EXCEPT AS HABITAT FOR SALTWATER – TOLERANT WILDLIFE

Soils Info from Other Sources [On Site. DEM/ISDS. AP., Etc]:_____

Other Specific Geologic, Hydrologic and Topographic info: _____

Distance of Proposal to Coastal Feature and Elevations of Proposal: THE MAX. ELEV. OF THE PROPOSED 34 200 CU. YD ± FILL (11.4 AC±) IS INDICATED TO BE + 3.5' MSL, EXTENDING TO WITHIN 50' OF MEAN LOW WATER.

Other Pertinent Information: _____

APPLICANT'S NAME: PALAZZOLO

TOWN: WESTERLY

LOCATION: ADJ. SHORE GARDENS

FILE NO: 85-1-33

MEMO/RECOMMENDATIONS:

(CIRCLE ONE)

ENGINEERING COMMENTS.

THE HIGHLY COMPRESSIBLE NATURE OF MUCKY PEAT (AMONG OTHER POOR ENGINEERING CHARACTERISTICS) MAKES THIS SOIL COMPLEX UNDESIRABLE FOR A PARKING AREA/ROADWAY BASE, AS THERE EXISTS THE POTENTIAL FOR EXCESSIVE SETTLEMENT OVER TIME. (POSSIBLY REQUIRING ADDITIONAL FILLING). THE R.I. SOIL SURVEY NOTES A "POOR" RATING OF MATUMUCK PEAT AS

ROADFILL (NOTING WETNESS), ALSO, STORM SURGE FLOODING AND RECESSION WOULD CAUSE MAJOR SEDIMENTATION WITHIN THE POND.

PRESENTLY SEDIMENT, TRANSPORTED THROUGH THE STABILIZED INLET, IS ACCUMULATING ALONG THE SOUTHERN SHORE OF THE POND AS INDICATED BY THE INCREASING SIZE OF THE FLOOD TIDAL DELTAS AND DECREASING DEPTHS. (BOAT NAVIGATION MAY BE HINDERED BY THIS CONDITION.) THE PROPOSED FILL EXTENDS TO WITHIN 50' OF MLW. THE TOE OF THE PROPOSED, 1:6 SLOPED EMBANKMENT IS ACTUALLY AT MHW. EVEN WITH THE PROPOSED CONSERVATION MIX VEGETATIVE COVER STABILIZING THE SLOPE, THE CLOSE PROXIMITY OF THE TOE TO THE POND MAY CAUSE SEDIMENTATION, EROSION, AND TOE SCOURING FROM STORM WAVES AND TIDAL SURGES.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:

APPLICANT'S NAME: PALAZZOLO

TOWN: WESTERLY

LOCATION: ADJ SHORE GARDENS

FILE NO: 85-1-33

MEMO/[RECOMMENDATIONS*]:

(CIRCLE ONE)

---

* Bracketed word circled on original.

REFERENCE STAFF BIOLOGIST REPORT BY I KENENSKI DATED 7/16/85 FOR PREVALENT CONCERNS RELATED TO THE RICRMP.

IT IS STAFF CONCLUSION THAT THIS PROPOSAL WHICH REQUIRES A SPECIAL EXCEPTION TO FILL AND ALTER COASTAL WETLANDS (PER TABLE 1), HAS NOT MET THE PREREQUISITES OF SECTION 130 NAMELY TO DEMONSTRATE THAT "THE PROPOSED ACTIVITY SERVES A COMPELLING PUBLIC PURPOSE WHICH PROVIDES BENEFITS TO THE PUBLIC AS A WHOLE AS OPPOSED TO INDIVIDUAL OR PRIVATE INTERESTS" UNLESS THE CRMC DETERMINE THAT SUCH DEMONSTRATION HAS BEEN SHOWN IT IS STAFF OPINION THAT THE PROPOSAL REPRESENTS A DIRECT CONFLICT WITH ESTABLISHED POLICIES AND GOALS OF THE RI COASTAL RESOURCE MANAGEMENT PLAN.

REVIEWER'S/INSPECTOR'S SIGNATURE AND DATE:
/s/ Kenneth W. Anderson 7/25/85

STATE OF RHODE ISLAND
AND PROVIDENCE PLANTATIONS

WASHINGTON, Sc.	SUPERIOR COURT
ANTHONY PALAZZOLO)	WC/88-0297
VS.)	
STATE OF RHODE ISLAND)	
AND COASTAL)	
RESOURCES)	
MANAGEMENT COUNCIL)	

HEARD BEFORE MR. JUSTICE
FRANK J. WILLIAMS

ON JUNE 18 & 19, 1997

NON-JURY TRIAL - VOLUME 1 OF 4

Anthony Palazzolo

* * *

[98] Q Along the south shore of Winnapaug Pond, are there any built subdivisions that resemble this particular subdivision?

A No.

Q Okay. Isn't the pattern of development on the south shore of Winnapaug Pond for people to build their houses right along Atlantic Avenue?

A I think they are all zoned for houses. Some of the land you are referring to is not zoned for housing.

Q Isn't the pattern of development, as reflected in existing conditions, for people to build houses along Atlantic Avenue and leave the marsh undeveloped?

A Well, I think that's the question we are contesting.

Q I'm asking you the pattern with respect to -

A I don't know.

Q - other areas.

A I don't know what they think, sir. I have no idea how their thinking is.

Q Okay. I'm not asking you what people are thinking. I'm asking you what they have done.

A No one has, except on a couple of occasions that I know of, one guy built a house down there, and a couple other people put roadways in.

[99]Q So it wouldn't surprise you that aerial photographs will show that all of the - most of the residential houses in Misquamicut are bordering on Atlantic Avenue?

MR. WEBSTER: I'm going to object, your Honor. This is absolutely an improper way to cross-examine somebody, with the hypothetical that we don't have here yet.

MR. RUBIN: I think it's proper, your Honor.

THE COURT: I'll let you answer if you can. The answer is yes, right?

Q Yes. Is that the witness' answer?

A Yes. That's where the houses are on it.

* * *

[100] Q Now, you went to the Coastal Council, my client, twice; correct?

A Right.

Q Okay.

A Yes.

Q And the first time was in order to pursue the use as residential lots; correct?

A Correct.

Q Okay. Which is the use which you claim was taken from you?

A The use permitted under the W1 zoning code in Westerly.

Q Right. And that forms the basis of your lawsuit here today; correct?

A Well, I can't answer that fully, but I suppose part of it.

Q Right. So then you came back to Coastal and you asked for another and a different application; correct?

A Correct.

Q And that application was for a beach club?

A Correct.

Q Okay. But your claim before this Court today is based on residences and not a beach club; isn't that correct?

A Correct.

Q But you were denied the application that related to [101] residences back in 1985; isn't that correct?

A I was denied use of all my land. In whatever shape or form, I was denied.

Q In 1985?

A Correct.

Q Okay. But nonetheless, you claim that the date of the taking was February, 1986?

A I don't claim. The legal people that deal with say whatever they say –

* * *

JAN 18 2001

No. 99-2047

Supreme Court, U.S.
FILED
JAN 18 2001
CLERK

In the

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

PETITIONER'S REPLY BRIEF

JAMES S. BURLING
Counsel of Record
ERIC GRANT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

20 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTRODUCTION 1

I. MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE 1

A. Respondents' Ripeness Arguments Are Myths 1

1. The "Bait-and-Switch" Myth 1

2. The "Additional Lots" Myth 3

B. The Amici's Ripeness Arguments Are Meritless 5

1. The "Variance" Argument 5

2. The "Unresolved Issues" Argument 5

3. The "Not Binding" Argument 6

II. SGI'S DISSOLUTION DID NOT RELIEVE THE STATE OF THE OBLIGATION TO PAY FOR PROPERTY NOW ENJOYED BY THE PUBLIC 7

A. Title to This Property Has Always Included the Ability to Fill 8

B. Notice of a Regulation Does Not Alter the Title to Property Making It Subject to Uncompensated Enjoyment by the Public 12

C. Notice of a Regulation Does Not Destroy Investment-Backed Expectations Such That the Public Can Enjoy the Regulated Property Without Paying Just Compensation .. 16

TABLE OF CONTENTS—Continued

	Page
III. ECONOMIC VIABILITY IS NOT THE SAME AS ECONOMIC TOKENISM	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

	Page
Agins v. City of Tiburon, 447 U.S. 255 (1980)	19-20
Allen v. Allen, 32 A. 166 (R.I. 1895)	9
Armstrong v. United States, 364 U.S. 40 (1960)	1
Clark v. City of Providence, 15 A. 763 (R.I. 1888)	10
Clark v. Peckham, 10 R.I. 35 (R.I. 1871)	11
Dawson v. Broome, 53 A. 151 (R.I. 1902)	10, 12
Felder v. Casey, 487 U.S. 131 (1988)	7
Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999)	15
Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)	6
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	11, 13-14, 16
Lynch v. Household Finance Corp., 405 U.S. 538 (1972)	15
MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986)	3, 7
Nollan v. California Coastal Commission, 483 U.S. 825 (1987)	12
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	17, 20
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	11
Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996)	6, 13, 15-16

TABLE OF AUTHORITIES—Continued

Page

Providence Steam-Engine Co. v. Providence and Stonington Steamship Co., 12 R.I. 348 (R.I. 1879) 9-10, 16

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 6-7

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 13, 17

Washington Legal Foundation v. Legal Foundation of Washington, No. 98-35154, 2001 U.S. App. LEXIS 314 (9th Cir. Jan. 10, 2001) 14-15

West River Bridge Co. v. Dix, 47 U.S. (6 How.) 507 (1848) 15

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 5-7

Yates v. Milwaukee, 77 U.S. 497 (1870) 11

Statutes

Coastal Resources Management Program § 210.3(C)(1) ... 5

§ 210.3(C)(4) 5

§ 300.2(B)(1) 5

§ 300.2(B)(2) 5

§ 330(A)(1) 5

Constitution

R.I. Const. art. 1, § 16 10

Rules

Supreme Court Rule 15.2 3

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994) 19

Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211 11

R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. State Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Env. L. J. (forthcoming Apr. 2001) 18

Richard Pipes, *Property and Freedom* (1999) 15-16

INTRODUCTION

The briefs of Respondents and their allied amici, with all their talk about the importance of Mr. Palazzolo's wetlands, make clear the central point of this litigation: the State of Rhode Island and a certain element of the public very much enjoy the use of Mr. Palazzolo's property, and they would like to continue enjoying it for free. So far, they have succeeded. But what is at stake here is not whether it is in the public interest to protect 18 acres of wetlands in Rhode Island, but whether it is possible, as a practical and theoretical matter, for the putative owner of those wetlands to receive just compensation for his property after it has been seized for public use. Put another way, the question is not whether the public will acquire these wetlands for public purposes, but whether the public will pay for what it has already acquired. Must Mr. Palazzolo alone "bear public burdens which, in all fairness and justice, should be borne by the public as a whole?" *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

I

MR. PALAZZOLO'S REGULATORY TAKINGS CLAIM IS RIPE

A. Respondents' Ripeness Arguments Are Myths

While the public is enjoying the public interest values in Mr. Palazzolo's property, Respondents resort to myths to avoid the merits of his claim for compensation.

1. The "Bait-and-Switch" Myth

The first ripeness-related myth spun by Respondents is that Mr. Palazzolo "failed to apply for the subdivision proposal he claims to have been denied." Brief for Respondents (RB) at 21 (capitalization altered). In this jaundiced view, Mr. Palazzolo "strategic[ally]" applied to the Coastal Resources Management Council (CRMC) to do one thing, but later based his takings claim on something completely different. Not so.

In 1983, Mr. Palazzolo applied to CRMC "to fill approximately 18 acres of salt marsh on the subject property." App. in Pet. for Writ of Cert. (PA) at B-3. CRMC "denied the plaintiff's application and he did not appeal that decision." *Id.* Instead, he sought CRMC approval for an obviously "less ambitious" proposal, namely, "to fill approximately 11.4 acres." Joint Appendix (JA) at 32. Though Respondents accuse Mr. Palazzolo of "deliberately obscuring the reasons why he sought to fill" that acreage, RB at 21, those reasons were perfectly clear. In CRMC's very own words, he sought "to fill a contiguous wetland . . . to establish a private beach club for seasonal use." JA at 25. When CRMC denied the 1985 application as well, Mr. Palazzolo brought the instant action. While his complaint recited the history of his involvement with the property (including dealings with state agencies in the 1960's), *see* JA at 43-44, it pointedly did not even mention the superseded 1983 application to CRMC. Nor did the complaint mention a "plan to fill the entire eighteen acres for an intensive residential subdivision development." RB at 23. Instead, the complaint's factual allegations climaxed with the 1985 application, reciting (in the same words used by CRMC) that Mr. Palazzolo had "proposed to fill a contiguous wetland . . . to establish a beach club for seasonal use only." JA at 44-45, ¶¶ 11-12. Therefore, it was surely the 1985 application that was the "subject of his claim" under the Takings Clause. RB at 23.[1]

Mr. Palazzolo is not trying to "have it both ways." *Id.* at 29. There ***is*** "congruity" between ripeness and the merits: CRMC's denial of Mr. Palazzolo's 1985 application, in conjunction with the agency's more general refusal to allow him to develop his eighteen-plus acres with anything more than one single-family home, was the final decision that makes this

[1] Having had six weeks to dredge the record for any evidence to the contrary, Respondents can produce only a single citation, and that to a passage in which their counsel is grilling a nonlawyer plaintiff about the legal theory of his case. *See* RB at 23 n.33.

case ripe. It is that very refusal that Mr. Palazzolo claims is a compensable taking, and he is still waiting for a court to evaluate that claim under the correct legal standards.

2. The "Additional Lots" Myth

The second ripeness-related myth spun by Respondents is that "[t]he record is not sufficient to support Palazzolo's further contention that [CRMC] would permit 'one single-family home and nothing more.'" RB at 26 (quoting Petitioner's Brief on the Merits at 13). As takings defendants are wont to do, Respondents speculate that "there ***might be*** additional upland portions on Palazzolo's eighteen acres that would support three or four additional lots." *Id.* at 26-27 (emphasis added). But the Court should reject Respondents' cynical, last-gasp attempt to introduce doubt about the "type and intensity of development legally permitted" on Mr. Palazzolo's property. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986).

First, Respondents' speculation is inconsistent with their failure, in their opposition to the petition, to contradict the petition's statement that permitted development on the property is limited to "one single-family home and nothing more." Petition for Writ of Certiorari at 15. *Cf.* Rule 15.2 (admonishing Respondents' counsel "to point out in the brief in opposition, *and not later*, any perceived misstatement made in the petition" (emphasis added)). Indeed, Respondents affirmatively *agreed with* the petition's statement, stating that a "portion of the site . . . would have been approved by the CRMC as *a single home site*." Memorandum in Opposition to Petition for Writ of Certiorari at 4 (emphasis added). Respondents should not be allowed to change their story now.

Second, if the Court examines the nitty-gritty facts, it will find that Respondents' version is *simply false*. The "evidence" that Mr. Palazzolo could build houses on three or four additional lots consists solely of testimony by two government witnesses. CRMC Director Fugate said nothing more specific

than "there may be" other upland areas on which Mr. Palazzolo could build additional homes. RB at 27 n.40. Engineer Steven Clarke was superficially more helpful to Respondents, testifying on direct examination that " 'the site has two upland areas' " that could be used for homesites and that it "'would be realistic to apply for those locations.' " *Id.*[2]

In evaluating this testimony, however, it is crucial to see exactly *to whom* and *for what* Mr. Clarke thought it was "realistic to apply." The full context of the quoted statement makes it abundantly clear that Mr. Clarke's comment was directed to applying to the *Department of Environmental Management* (not to CRMC) for an *ISDS (septic) variance* (not for a variance from CRMC regulations). *See* Respondents' Appendix (RA) at A-42 to A-43. But was it "realistic to apply" *to CRMC* with respect to the "second" upland location that is the subject of disagreement, which Clarke identified as the "68 through 71, 72 area?" RA at A-44 (referring to the numbered lots on the map at Joint Lodging No. 1 (JL1) Tab 7 at 2). On that point, Mr. Clarke conceded on cross-examination that one "would have to construct a road to get to these lots." TT at 623. He further conceded—and this is what Respondents cynically ignore—that when one "put[s] a road here to get to these lots," one must "*put fill in the coastal wetlands to do so.*" *Id.* (emphasis added). But as the trial court noted, CRMC told Mr. Palazzolo that "*any* proposal involving the filling of wetlands would be denied." PA at B-5 (emphasis added).

For these reasons, Respondents' last-minute speculation that "there might be additional upland portions on Palazzolo's eighteen acres that would support three or four additional lots,"

---

[2] The first such site is fill located on the end of a road turnaround and can be seen best in Photo 7, Tab 7, JL1. The second upland site was only casually mentioned at trial as an "island." Testimony of Steven Clarke, Trial Transcript (TT) at 610. It can be seen in Photo 3, Tab 7, JL1, as the hummocky area in the distance.

RB at 26-27, is procedurally improper and substantively false. The Court should reject it outright.

B. The Amici's Ripeness Arguments Are Meritless

1. The "Variance" Argument

Certain amici argue that Mr. Palazzolo needed to seek a "variance" from CRMC's no-fill regulations in order to ripen his claim. But at no time have Respondents, who are presumably in the best position to know, even suggested that a variance could conceivably be granted for the filling of wetlands. It is no surprise why not. Coastal Resources Management Program (CRMP) regulations provide that to grant a variance, CRMC must find that "[t]he proposed alteration conforms with applicable goals and policies in Parts Two and Three [§§ 200-330]." CRMP § 120(A)(1), *reprinted in* Respondents' Lodging at 29. In denying Mr. Palazzolo's 1985 application, however, CRMP explicitly found to the contrary, namely, that "[t]he proposed project is in conflict with" no fewer than five such goals and policies. JA at 27-28 (citing CRMP §§ 210.3(C)(1), 210.3(C)(4), 300.2(B)(1), 300.2(B)(2), and 330(A)(1)). A variance was not an option in this case.

2. The "Unresolved Issues" Argument

The Brief of States of California, et al., as Amici Curiae in Support of Respondents (Brief of Amici States) argues that "a taking claim is not ripe until the landowner establishes"—in a separate litigation—"the boundaries of the property that he proposes to develop and upon which he bases his taking claim." *Id.* at 10. Bracketing the fact that this theory seems to have been created by the California courts, *see id.*, the theory rests on the manifestly erroneous premise that an owner must obtain a final *judicial* decision on various state-law issues to ripen a regulatory takings claim. *See, e.g., Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 191 (1985) (ripeness is satisfied when "the *administrative agency* has arrived at a final, definitive position

regarding how it will apply the regulations at issue" (emphasis added); *id.* at 193 (by contrast, ripeness does *not* require an owner to resort to "*judicial procedures*" (emphasis added)); *accord Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 737, 739 (1997) (referring to "*Williamson County*'s requirement of a final *agency* position" and to "*agency* action of the sort demanded by *Williamson County*" (emphasis added)).

Moreover, the theory advanced by the Amici States conflicts with the practice of federal courts to treat asserted state-law shields to regulatory takings claims—like the assertion that "the lands that Palazzolo proposed to fill . . . were public trust lands belonging to Rhode Island," Brief of Amici States at 9— as *affirmative defenses* to the takings claim, not as issues that must be resolved in another forum before the claim can even be asserted. *See, e.g., Preseault v. United States*, 100 F.3d 1525, 1530 (Fed. Cir. 1996) (en banc) (plurality opinion) (treating the Government's assertion that an easement burdened the plaintiffs' property as one of "the Government's defenses based on the state's property law"); *id.* at 1555 (Clevenger, J., dissenting) (treating the assertion in similar fashion); *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1183 (Fed. Cir. 1994) ("[T]he Government had failed to carry its burden of showing that [nuisance] law could have been invoked to prevent the fill."). Any "boundaries" (or "nuisance" or "public trust") issue may be asserted by Respondents on remand as an affirmative defense; those issues do not make the case unripe.

3. The "Not Binding" Argument

The Brief of National Conference of State Legislatures, et al., as *Amici Curiae* in Support of Respondents (Brief of National Conference) urges the Court to hold the case unripe on state-law grounds that the Supreme Court of Rhode Island did not even cite. *See id.* at 5-16. To achieve this result, the brief

argues that this Court's own ripeness rules, particularly the *Williamson County* final decision requirement, "are not binding on the State's courts." *Id.* at 5. This argument fails for three reasons. First, it is irreconcilable with *MacDonald*, which obviously applied the final decision requirement to litigation arising from the *California state courts*. Second, the argument is premised on the idea that *Williamson County*'s other prong (the exhaustion/state procedures requirement) applies to federal takings claims asserted in state courts; however that requirement applies only to takings claims "brought against a state entity *in federal court*." *Suitum*, 520 U.S. at 734 (emphasis added). Third, the argument is intended to justify a regime in which state courts may erect outcome-determinative hurdles to the consideration of federal takings claims beyond those limitations imposed by this Court for federal courts; but such a regime is improper. *See, e.g., Felder v. Casey*, 487 U.S. 131, 141 (1988) (criticizing state-law rules that "will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court," and holding that "[s]tates may not apply such an outcome-determinative law when entertaining substantive federal rights in their courts").

In sum, the gauntlet of additional permitting processes and administrative and judicial proceedings to which Respondents and their amici would subject Mr. Palazzolo perfectly typifies the "piecemeal litigation or otherwise unfair procedures" that this Court rightly condemned in *MacDonald*, 477 U.S. at 350 n.7. This case is ripe, and it is time to reach the merits.

II

SGI'S DISSOLUTION DID NOT RELIEVE THE STATE OF THE OBLIGATION TO PAY FOR PROPERTY NOW ENJOYED BY THE PUBLIC

Nothing in the briefs of Respondents or Amici provides adequate support for the suggestion that this Court should, in

effect, overrule *Nollan*, overrule *Lucas*, and overrule centuries of common law tradition in real property law. But this is what must be done in order to uphold the decision below that the public may enjoy interests in private property that it has not paid for simply because the ownership of that property changes after a regulatory scheme is adopted.

The court below advanced two theories in support of the notion that Mr. Palazzolo's notice of the 1971 regulations in 1978 gives the State the ability to seize the development rights without the payment of compensation. First, the court suggested that the notice, when combined with the transfer of ownership from the corporation to Mr. Palazzolo, changed the underlying title to the property. Second, the court found that notice of the 1971 regulations destroyed Mr. Palazzolo's investment-backed expectations. Both theories are wrong as will be explained below. Interestingly, the State says little to defend these theories. Instead of focusing on the question presented, whether the takings claim is categorically barred whenever a regulation's enactment predates the acquisition, the Respondents suggest simply that the whole panoply of regulations and property doctrines in existence from the beginnings of the State to the present time work upon the "background principles" of property here to obviate any possibility that Mr. Palazzolo, or any of his predecessors, ever had the right to fill. RB at 35-46. Not only is this not an issue before this Court, but it is wrong.

A. Title to This Property Has Always Included the Ability to Fill

Despite the posturing of the Respondents, Mr. Palazzolo's property has always included the right to fill, subject of course—like virtually all development today—to permit approval by the State. While the court below did not address the State's "public trust" arguments, the State continues to suggest that Mr. Palazzolo's rights cannot withstand Rhode Island's changing common law and the public trust doctrine.

See, e.g., RB at 39, 42-46. Amici United States and National Conference of State Legislatures, et al., further suggest that Mr. Palazzolo doesn't actually *own* the portions of the lots that lie below the mean high tide line—another issue not reached by the court below. Brief of United States at 20 n.10, Brief of National Conference at 10. Although this Court ought not and need not reach these unlitigated title issues, the following few paragraphs are provided to dispel any suggestion that Mr. Palazzolo has been asking for something to which he is not entitled. To put it bluntly, Mr. Palazzolo, like all of his predecessors in title, had the right to develop his wetlands.

As stated many years ago by the Rhode Island Supreme Court: "The right to build wharves and to fill out the upland may be exercised, as against anyone but the State provided navigation is not impeded, or a nuisance created thereby.". *Allen v. Allen*, 32 A. 166, 166 (R.I. 1895). And, as more thoroughly explained in a case dealing with the title to tideland (rather than just wetlands) filled for industrial development in Providence on Naragansset Bay:

> In this State it has always been understood that the riparian owner has the right to wharf or embank against his land, and so make land from tide-water, and this without license, provided he does not interfere with the navigation. . . .
>
> The State never undertook to regulate this right till 1815, and then did not profess to grant a right, but only to prevent encroachment to save the harbor . . . .
>
> . . . .
>
> ***The right to wharf out or reclaim is a valuable right even before its exercise. It constitutes a part of the value and sometimes nearly the whole value of the upland.***

Providence Steam-Engine Co. v. Providence and Stonington Steamship Co., 12 R.I. 348, 363-64 (R.I. 1879) (emphasis added) (Potter, J., concurring). *Accord Dawson v. Broome*, 53 A. 151, 157 (R.I. 1902).[3]

Respondents further suggest that the portion of the Rhode Island Constitution, that pertains to preserving the "rights of fishery, and the privileges of the shore" effects a background principle to exempt the State from takings liability, RB at 40, 43-44. However, at one time the full text of the fisheries section of the constitution read:

> "The people shall continue to enjoy and freely exercise all the rights of fishery, and the privileges of the shore to which they have been heretofore entitled under the charter and usages of this State. ***But no new right is intended to be granted, nor any existing right impaired, by this declaration***."

Quoted in Clark v. City of Providence, 15 A. 763, 765 (R.I. 1888) (emphasis added). Thus despite the modern gloss put onto the Rhode Island Constitution, and despite the subsequent elimination of the highlighted language, it is clear that at one time the right to regulate in order to protect the fishery was not seen to be in conflict with existing property rights—including the right to fill.

Nor can Respondents find refuge in the more recent language of the Rhode Island Constitution, article 1, section 16, which purports to exempt the exercise of the powers to "regulate and control the use of land and waters in the furtherance of the preservation, regeneration, and restoration of

---

[3] This right has been long enjoyed by citizens in Rhode Island. As amici Dr. Teal, et al., point out, "10% of Rhode Island's coastal wetlands greater than 40 acres were filled between 1955 and 1964." Brief of Dr. Teal at 10. Surely it was reasonable for Mr. Palazzolo to expect to develop his property.

the natural environment" from being a "public use of private property." As this Court held in *Lucas*, if "instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, 'the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared.' " *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014 (1992) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). Moreover, the doctrine of regulatory takings, as applied to *riparian* property owners, has been around in Rhode Island since at least 1871. *See Clark v. Peckham*, 10 R.I. 35, 38 (R.I. 1871) ("[T]his riparian right of access is valuable—is property, and can only be taken on compensation." (citing *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) (right to wharf out can only be taken with "due compensation"))).[4]

Respondents and Amicus United States suggest that Mr. Palazzolo has no right to develop his property because that would be a nuisance. RB at 43, Brief of United States at 19-20, citing to the trial court decision. Of course, the trial court was primarily referring to the water quality issues caused by nitrates from septic systems in the context of Mr. Palazzolo's proposal to fill 18 acres of wetlands (assuming he would build a subdivision), ***not*** his proposal to build a beach club without a septic system. PA at B-10 to B-11. As noted, however, the 1983 application is not the basis of this suit. More importantly, the Rhode Island Supreme Court never reached this issue, and this Court need not decide whether Mr. Palazzolo's background principles are affected by any alleged harm from the 1983

---

[4] With respect to suggestions from the brief of Amicus La Plata, Colorado (Brief of La Plata), at 17-18, that the doctrine of regulatory takings is some new-fangled judicial construction, little needs to be said. La Plata is in error. *See* Kris W. Kobach, *The Origins of Regulatory Takings: Setting the Record Straight*, 1996 Utah L. Rev. 1211.

application. The issue is simply not pertinent to the questions presented to this Court.[5]

In short, while the issues of public trust, title to submerged lands, and nuisance are not before this Court, this Court can rest assured that Mr. Palazzolo's case for the existence of defensible private property rights in his parcel rests on solid ground.

B. Notice of a Regulation Does Not Alter the Title to Property Making It Subject to Uncompensated Enjoyment by the Public

Amicus United States tries to avoid the *stare decisis* impact of this Court's holding in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), that "prior owners must be understood to have transferred their full property rights in conveying the lot" by suggesting that the *Nollan* holding must be confined to physical invasions. *See, e.g.*, Brief of United States at 28-29 n.15. But there is nothing in the logic of *Nollan* that supports a distinction between a taking arising from an unlawful exaction of a public easement and a taking arising from the pressing into public service of 18 acres of wetlands. In fact, this holding in *Nollan* was in response to Justice Brennan's remarks concerning not simply a physical invasion but "investment-backed expectations," and "notice" of the "regulation" of "development permits." 483 U.S. at 857, 859, 860 (Brennan, J., dissenting). The Nollans' rights in their property were the same as the rights held by the

---

[5] In any event, the Rhode Island Supreme Court has previously noted:

> At common law the erection of a wharf in tide-waters is ***not indictable as a nuisance*** unless it obstructs navigation. . . . [T]his doctrine has been liberally applied for the benefit of riparian proprietors . . . [who] have been very freely permitted . . . even to make new land by filling the flats in front of their land.

Dawson v. Broome, 53 A. at 155 (emphasis added).

prior owners; so too, Mr. Palazzolo's rights in his property are the same as the rights that were held by Shore Gardens. More importantly, the logic of the *Nollan* rule that notice of a regulation does not destroy a purchaser's right to property should be ***stronger*** for instances of regulatory takings. Landowners are much more likely to be aware of the existence and implications of a physical invasion than of a regulatory taking—especially when the existence of a regulatory taking can never be confirmed until the regulation is applied. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985) (The mere existence of a regulatory permitting requirement does not, in and of itself, constitute a taking.).[6]

Respondents and Amici conflate the "background principles" language of *Lucas* with the full extent of the State's police power—wherein everything from the Royal Charter of 1663 to the Clean Water Act of 1972 fall under the rubric of " 'existing rules or understandings.' " *See Lucas*, 505 U.S. at 1030. *See, e.g.*, RB at 44 (1663 Charter), Brief of United States at 20 n.10 (Clean Water Act). But this Court was far more precise in *Lucas*, stating: "The use of these properties for what are now expressly prohibited purposes was ***always*** unlawful, and (subject to other constitutional limitations) it was open to the State at any point to make the implication of those background principles of nuisance and property law explicit." 505 U.S. at 1030 (emphasis in original). While a landowner may expect there to be certain restrictions or permitting requirements, a landowner certainly does not expect that government may take away the economically viable use of valuable property without paying just compensation. *See, e.g.*, *Preseault*, 100 F.3d at 1540 (noting that "a taking of a recognized property interest, invokes a general expectation of

---

[6] The suggestion by the United States that Mr. Palazzolo is arguing for an "assignment" of a constitutional claim is unfounded. Brief of United States at 28-29. There was no "constitutional claim" until the regulation was ***applied***, an event which did not occur until 1986.

compensation"). Property owners must face the obvious fact of life that the use of property often involves regulatory constraints and that such restraints may be modified in the future. But that does not mean that newly adopted regulatory restraints somehow affect the very title of the property itself. If that were so, then title to property would be infinitely malleable by legislative fiat. As this Court further said in *Lucas*: "When, however, a regulation that declares 'off-limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it." *Lucas*, 505 U.S. at 1030.

In this case, the requirement that all uses of coastal wetlands in Rhode Island meet some "compelling public purpose providing benefits to the public as a whole as opposed to individual or private interests" is most certainly a newly decreed requirement, having been decreed by the CRMC regulations only a few years before Mr. Palazollo acquired the property that is now being enjoyed by the public.

The notion that the state can relentlessly reduce through regulatory redefinition background rights in property is contrary to our traditional understanding that while property may be created by government, it cannot be taken back without compensation. As the Ninth Circuit recently wrote,

> "there is, we think, a 'core' notion of constitutionally protected property," and a state's power to alter it by legislation "operates as a one-way ratchet of sorts," allowing the states to create new property rights but not to encroach on traditional property rights. . . . "[W]ere the rule otherwise, States could unilaterally dictate the content of—indeed altogether opt out of—both the Takings Clause and the Due Process Clause simply by statutorily recharacterizing traditional property-law concepts."

Washington Legal Foundation v. Legal Foundation of Washington, No. 98-35154, 2001 U.S. App. LEXIS 314 (9th Cir. Jan. 10, 2001) (citations and footnotes omitted). *Accord West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 532 (1848) (state must respect property rights it invests in its citizens). *See also Gulf Power Co. v. United States*, 187 F.3d 1324, 1330 (11th Cir. 1999) ("[T]he fact a utility gained its property knowing it would be subject to extensive regulation for the public use does not means [sic] its property may be taken for a public purpose without payment of just compensation, however laudable that public purpose might be."); *Preseault*, 100 F.3d at 1540 (rejecting "the proposition that an owner's property rights are defined by what the owner might (should?) have believed the law to be at the time she acquired her property, and that that belief makes it so").

If the State's theory of property were to be accepted, then the principle that property is a fundamental right that may be regulated but not defined by legislative action would have to succumb to the positivist notion that all property, and concomitantly all rights, are a result of state beneficence. But this Court has too often noted the "interdependence" between liberty and property for one to be particularly sanguine about the prospect of a legal system that would allow legislative action to be the ultimate arbiter of what is and what is not property. *See, e.g., Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972). Indeed, more recent scholarship makes a compelling case for the theory that the rise of individual and political liberties in western Europe in general, and in England in particular, was inextricably tied to the developing understanding that property is a fundamental right that is not dependent upon the pleasure of the sovereign. *See* Richard Pipes, *Property and Freedom* 121-58 (1999). If the sovereign could seize private property for whatever purpose, noble or otherwise, without making some fair recompense to the owner—then the development of western concepts of liberty

would have been dramatically curtailed, at best. *Id.* at 159-208 (discussing the inhibition on the development of personal and political freedoms in Russia, where princes, czars, and dictators could, and did, seize property with impunity). In short, the implications from the State's "title theory," wherein notice of a regulation undermines the preexisting title in property, such that the State can effect an uncompensated seizure of interests in private property, are disturbing and without foundation in American jurisprudence and its essential understandings of liberty.

C. Notice of a Regulation Does Not Destroy Investment-Backed Expectations Such That the Public Can Enjoy the Regulated Property Without Paying Just Compensation

Respondents and allied amici insist that because Mr. Palazzolo acquired his land in 1978, after the CRMC regulations were adopted, he had no "investment-backed expectations" in developing his property. *See, e.g.*, RB at 48.

As a preliminary matter, it should be asked who was on notice of what? Certainly landowners like Mr. Palazzolo in Rhode Island were on notice not only of the permitting requirements affecting the filling of property, but also of the centuries of tradition wherein landowners freely reclaimed tidelands. *See, e.g., Providence Steam-Engine Co.*, 12 R.I. at 363-64. But he was ***not*** on notice that there was an outright ban on all filling of wetlands for residential or private recreational development. He was ***not*** on notice that the public would forevermore enjoy the benefits of his property in its undeveloped state without payment. *Preseault*, 100 F.3d at 1540 (there is an expectation ***to be*** compensated). Likewise, the State was on notice that a regulation that goes "too far" is a taking and that, under the Constitution, "compensation must be paid" when economically beneficial use is denied. *Lucas*, 505 U.S. at 1030.

In *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), a landowner's "distinct investment-backed expectation" was listed as a factor to consider in determining whether liability attaches for a regulatory taking. It should be quite clear that notice of a regulatory scheme does not destroy all expectations of obtaining a permit. One need look no further than *Penn Central* itself, where one of the appellants, Union General Properties (UGP), acquired its leasehold interest in the Penn Central property ***after*** it was designated as a landmark. *Id.* at 116. Despite the fact that UGP was on "notice," that fact was not dispositive.

Whether it be a taking from a physical invasion or the application of a regulation, there is no logical reason why the existence of a regulatory scheme should put landowners on "notice" that they have no "investment-backed expectations" to utilize their property in an economically beneficial manner:

> The reasons are obvious. A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

Riverside Bayview, 474 U.S. at 127. Not until 1986, after a string of permit denials based upon, among other things, a "compelling public interest" policy against residential

dwellings, could Mr. Palazzolo have known that his property was no longer his.[7]

It should suffice to say that whatever effect the existence of the CRMC regulations may have had on Mr. Palazzolo's investment-backed expectations in 1978, that effect is not particularly relevant to the question of the State's liability for a regulatory taking. In short, Mr. Palazzolo's expectations most assuredly did not include an expectation that the public would wind up enjoying the benefits of his 18 acres without payment.

III

ECONOMIC VIABILITY IS NOT THE SAME AS ECONOMIC TOKENISM

The third question presented to this Court is whether "the remaining permissible uses of the property are *economically viable* merely because the property retains a value greater than zero." The State protests that the ability to utilize a small portion of the property as a homesite obviates whatever harm has been suffered over all the rest of the property. RB at 29-31. Respondents further claim that there can be no taking because the total value of Mr. Palazzolo's "investment " was $13,000, based on acquisitions in 1959 and 1969. RB at 30.

Surely, the State is trying to have it both ways. If Mr. Palazzolo did not acquire the property until 1978, then

---

[7] A more appropriate role for expectations is a determination of the amount of ***compensation*** rather than a determination of the underlying ***liability***. *See* R. S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. State Clarify the Supreme Court's Murky Doctrine of Investment-Backed Expectations in Regulatory Takings Law?*, 9 N.Y.U. Env. L. J. (forthcoming Apr. 2001) (noting that the judicial inquiry into a landowner's investment-backed expectation is necessarily fact-driven and is properly concerned with determining the appropriate level of compensation, not with establishing takings liability).

SGI's purchase price has no relevance to this case. Besides, whether one pays too much, too little, inherits, or wins property in a game of chance, the government's liability should depend only on what has truly been taken—in this case the use of 18 acres. The more crucial inquiry, and the one presented to this Court, is whether the potential use of a tiny bit of upland obviates the destruction of the use of 18 acres of wetland. Respondents are essentially asking for a categorical rule that whenever any use remains in any portion of a property, there can be no taking. This Court should reject such a rule. Economic viability must mean more than economic tokenism. A proper analysis (not attempted by the court below) of the potential uses of the property in 1978 and its value at that time—as compared to its potential uses and value after 1986—could help guide a court to determining whether the property is truly economically viable. But the facile notion that any use, no matter how truncated, is economically viable cannot be maintained.

Amicus County of La Plata suggests that to allow a landowner to receive compensation when a token use remains would encourage strategic behavior by landowners. Brief of La Plata at 16; *see* PA at A-16 ("pernicious" claims). Under this logic, the state can freely seize 1000 acres, so long as the owner owns 1001. Since the Takings Clause is not an engine of redistribution, it would be better to find a formulation that compensates landowners whenever a significant portion of property has been taken for public use.[8]

Mr. Palazzolo, of course is not asking for a guarantee of a "positive return on his investment." Brief of United States at 22-23 n.12. Rather, what is at stake here is whether there is a denial of economically viable use as contemplated by *Agins v.*

---

[8] For a defensible test, and one that avoids paying compensation for mere setbacks, *see* John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1557 (1994).

City of Tiburon, 447 U.S. 255 (1980), and *Lucas* when there is a combination of: (1) a denial of all use of 18 acres, (2) the public's enjoyment of that property, and (3) the tremendous economic loss in value manifested by a negative return on the value of the property in 1978. As this Court noted in *Penn Central*, a taking was not found there in part because the owners had the "present ability to use the Terminal ***for its intended purposes and in a gainful fashion***." 438 U.S. at 138 n.36 (emphasis added). It can hardly be considered "gainful" to take a highly valuable property, allegedly worth $3.1 million (based on comparable sales), and reduce it to a potential of a mere $200,000.

CONCLUSION

In 1986, and not before, the State of Rhode Island removed all doubt about whether Mr. Palazzolo could put any of his wetlands to private economic use. The loss has been so severe that he has not enjoyed any "reciprocity of advantage" and has not received any "givings" from the regulation of what were once his wetlands. He has suffered a wipeout that is not erased by the remnant value of a single putative homesite. Because the public is enjoying all the benefits of his wetlands, the public should pay for it.

DATED: January, 2001.

Respectfully submitted,

JAMES S. BURLING
Counsel of Record
ERIC GRANT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

JAN 3 2001

JAN 3 2001

No. 99-2047

In the Supreme Court of the United States

ANTHONY PALAZZOLO, PETITIONER

v.

RHODE ISLAND, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

SETH P. WAXMAN
Solicitor General
Counsel of Record

LOIS J. SCHIFFER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

MALCOLM L. STEWART
Assistant to the Solicitor General

WILLIAM B. LAZARUS
R. JUSTIN SMITH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Supreme Court of Rhode Island permissibly treated petitioner's takings claim as unripe, where that takings claim was based on the State's purported refusal to allow large-scale residential development on petitioner's property and petitioner had never sought permission from the appropriate state officials to construct residences.

2. Whether petitioner can establish a taking of property through proof that his land would dramatically increase in value if longstanding development restrictions were removed, even though the restrictions were in effect at the time petitioner acquired the property and the land retains substantial value notwithstanding the restrictions.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	7
Argument	9
I. The Supreme Court of Rhode Island permissibly held that petitioner's claim for just compensation was unripe	11
II. Petitioner cannot establish a taking of property simply by proving that his land would dramatically increase in value if development restrictions that predate his acquisition of the land were eliminated	21
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Abbott Labs. v. *Gardner*, 387 U.S. 136 (1967)	12
Agins v. *Tiburon*, 447 U.S. 255 (1980)	26
Armstrong v. *United States*, 364 U.S. 40 (1960)	10, 24
Brown v. *Western Ry. of Ala.*, 338 U.S. 294 (1949)	13
Concrete Pipe & Prods. of Cal., Inc. v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602 (1993)	22
Connolly v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986)	24
Dolan v. *City of Tigard*, 512 U.S. 374 (1994)	10, 22
Felder v. *Casey*, 487 U.S. 131 (1988)	13
FTC v. *Standard Oil Co.*, 449 U.S. 232 (1980)	12
Hodel v. *Irving*, 481 U.S. 704 (1987)	26
Howlett v. *Rose*, 496 U.S. 356 (1990)	13
Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984)	10, 25

Cases—Continued: Page

Leslie Salt Co. v. *Froehlke*, 578 F.2d 742 (9th Cir. 1978) 20
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 10, 29
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) ..... *passim*
Lujan v. *National Wildlife Fed'n*, 497 U.S. 871 (1990) 12
MacDonald, Sommer & Frates v. *Yolo County*, 477 U.S. 340 (1986) 11, 12, 14
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 10, 25, 28, 29
Ohio Forestry Ass'n v. *Sierra Club*, 523 U.S. 726 (1998) 12
Penn Cent. Transp. Co. v. *New York City*, 438 U.S. 104 (1978) 7, 22, 23
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 9, 26
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 23
Suitum v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997) 11, 12
Toilet Goods Ass'n v. *Gardner*, 387 U.S. 158 (1967) 12-13
United States v. *Riverside Bayview Homes*, 474 U.S. 121 (1985) 20
Village of Arlington Heights v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) 13
Weinberger v. *Salfi*, 422 U.S. 749 (1975) 19
Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 6, 10, 11, 21, 24

Constitution and statutes: Page

U.S. Const. Amend. V (Just Compensation Clause) 1, 10, 22, 24
Clean Water Act § 404, 33 U.S.C. 1344 20
Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.* 1, 3
16 U.S.C. 1452(2)(A) 1, 3
Rivers and HarborsAppropriation Act of 1899 § 10, 33 U.S.C. 403 20
R.I. Gen. Laws §§ 46-23-1 *et seq.* (1956) 3

Miscellaneous:

State of Rhode Island Coastal Resources Management Program:
§ 130 15
§ 130A 15
§ 130A(1) 3, 15, 16
§ 210.3C 3, 15
§ 300.1 16
§ 300.3(B) 17
§ 300.3(B)(1) 17
§ 300.3(B)(2) 17
§ 320(C)(6) 17

In the Supreme Court of the United States

No. 99-2047

ANTHONY PALAZZOLO, PETITIONER

v.

RHODE ISLAND, ET AL.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF RHODE ISLAND

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE UNITED STATES

This case presents both procedural and substantive questions concerning the application of the Just Compensation Clause of the Fifth Amendment to restrictions on development in coastal wetlands. The Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.*, establishes a national policy of protecting the resources of the Nation's coastal zone and encouraging States to adopt coastal management programs that, *inter alia*, seek to provide for "the protection of natural resources, including wetlands." 16 U.S.C. 1452(2)(A). In addition, federal agencies are vested by various statutes with the responsibility to determine the scope and type of development that will be permitted in environmentally sensitive areas, including wetlands.

STATEMENT

1. The site at the center of this dispute consists of some 18 acres of coastal wetlands, and an adjacent area of "no more than a few additional upland acres," in the Town of Westerly, Rhode Island. Pet. App. A2, A3 n.1. In 1959, petitioner, along with two business associates, purchased the site for $8000 and transferred it to Shore Gardens, Inc.

(SGI). See *id.* at A2, B2. Petitioner was president of SGI; in 1960, he became sole shareholder. *Id.* at A2. The Town approved a plat subdividing the site into 80 lots; 11 of those, "apparently in the upland area of the parcel," were sold to various purchasers, for amounts that are not clear on the record. *Ibid.* In 1969, SGI re-acquired five of the lots for $5000. *Id.* at A2, B2. Houses have been built on at least some of the other six lots. J.A. 79. In February 1978, SGI's corporate charter was revoked because annual reports required by state law had not been filed. Def. Exh. Y; see Pet. App. A3, B4.

As the Rhode Island Supreme Court explained,

> [s]ome of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and "ponding" in small pools occurs throughout the wetlands. The area serves as a refuge and feeding ground for fish, shellfish, and birds, provides a buffer for flooding, and absorbs and filters run-off into the pond.

Pet. App. A3. In 1962 and 1963, petitioner applied for permission to fill the site with material dredged from Winnapaug Pond. *Id.* at A3, B2.[1] In 1966, he filed a new application, seeking permission to dredge the Pond and fill tidal marshland areas in order to construct a recreational beach facility. *Id.* at A4, B2. In 1971 the State's Division of Harbors and Rivers (DHR) authorized petitioner to proceed with one plan or the other. *Id.* at A4, B2-B3. Shortly

[1] "At the time of these two applications, there was no statutory requirement that any state agency approve the filling of coastal wetlands, but a party wishing to dredge a river or pond was required to gain approval of [the State's Division of Harbors and Rivers (DHR)]." Pet. App. A3-A4. In 1965, however, the Rhode Island legislature enacted new statutory provisions that transferred the DHR to the newly-created Department of Natural Resources (DNR) and gave the DNR the authority to restrict filling in coastal wetlands. *Id.* at A3 & n.2, A4.

thereafter, however, the agency revoked that approval. *Id.* at A4, B3. Petitioner did not appeal from or otherwise challenge that decision. *Ibid.*

In 1971, the Rhode Island legislature created the Coastal Resources Management Council (CRMC) and gave that body authority to regulate filling of coastal wetlands. R.I. Gen. Laws §§ 46-23-1 *et seq* (1956). In 1972, Congress enacted the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. 1451 *et seq.* The CZMA establishes a national policy of protecting the resources of the Nation's coastal zone. The Act encourages States to adopt coastal management programs that, *inter alia*, seek to provide for "the protection of natural resources, including wetlands." 16 U.S.C. 1452(2)(A).

In 1977, the CRMC promulgated the Coastal Resources Management Program (CRMP). The CRMP generally prohibits the filling of coastal wetlands (like petitioner's) adjacent to Type 2 waters. See CRMP § 210.3C. The CRMP provides, however, for "special exceptions," under which an applicant may obtain permission to fill such wetlands by demonstrating, *inter alia*, that the project provides benefits "to the public as a whole as opposed to individual or private interests." *Id.* § 130A(1).

In 1983, petitioner applied to the CRMC for permission to construct a bulkhead on the shore of the Pond and fill the wetlands on the site. Pet. App. A5, B3. The stated purpose of the project was to control erosion. J.A. 60. The proposed filling activities would have included areas both above and below the mean high water mark. J.A. 60-61. Testifying before a subcommittee of the CRMC, petitioner refused to identify the use that he intended to make of the property if it was filled. J.A. 10-11. The CRMC denied the application. J.A. 14-19. The agency's decision explained that "[d]rawings submitted and on file at our office are vague and inadequate for a project of this size and nature," J.A. 16; that "the proposed activities will have significant impacts upon the waters and wetlands of Winnapaug Pond," J.A. 17; and that

the record revealed "a complete lack of evidence demonstrating to this Council the need and demand for the proposed activity," *ibid.*

In 1985, petitioner filed a new application to fill approximately 12 acres of wetlands on the property in order to construct a private beach club, including parking for 50 cars with boat trailers, a dumpster, port-a-johns, picnic tables, concrete barbecue pits, and trash receptacles. See J.A. 20-21, 25. Based in part on biological and engineering reports assessing the suitability of the location for the proposed activities (see J.A. 20-23), the CRMC denied the application. J.A. 25-30. The CRMC explained, *inter alia*, that "[t]he highly compressible nature of mucky peat makes this soil complex undesirable for parking or roadway base. The Rhode Island Soil Survey for the area notes a Poor Rating. Additionally, storm surge flooding and recession would cause major sedimentation within the Pond." J.A. 26. The CRMC also observed that "[f]illing of the marsh would destroy the natural shoreline protection, decrease sediment trapping and accretion, decrease flood storage, eliminate or greatly reduce nutrient retention in the area." J.A. 27. The Council concluded that petitioner had failed to establish that the proposed project would be consistent with the CRMP and that his application should therefore be denied. J.A. 27-29. The state superior court sustained the CRMC's decision. See J.A. 31-42.

2. In 1988, petitioner filed an inverse condemnation action in the state superior court, contending that the CRMC's denial of his development applications had effected a taking of property without just compensation, in violation of the United States and Rhode Island Constitutions. Pet. App. A5, B3-B4; see J.A. 43-46 (1995 amended complaint). Petitioner "sought damages in the amount of $3,150,000, based on the profits he claimed he would receive from filling the wetlands and developing the property as seventy-four lots for single-family homes." Pet. App. A5.

The superior court dismissed the suit. Pet. App. B1-B13. The court found that petitioner "as the sole stockholder of SGI was not the owner of the subject property until 1978, when the Secretary of State revoked SGI's corporate status." *Id.* at B8. The court held that "[b]ecause [petitioner] obtained title to the subject property in 1978, and because the regulations that prohibited the filling of wetlands were in place at that time, [petitioner] cannot prevail in his claim that the CRMC's actions constituted a categorical taking of his property when it denied the [petitioner's] 1985 application to fill wetlands on the subject property." *Id.* at B9. The court also noted that uncontradicted evidence introduced at trial indicated that the upland portion of the property was suitable for development; that the property if developed would have a value of approximately $200,000; and that the property would have a value of approximately $157,500 as an open-space gift. *Id.* at B9-B10.

As an alternative basis for its decision, the trial court concluded that petitioner could not establish a compensable taking even if he could prove a loss of all beneficial use of the property, since his proposed development would constitute a public nuisance. The court explained:

> The CRMC introduced evidence that the filling of 18 acres of salt marsh would reduce the existing salt marsh in Winnapaug Pond by 12 percent. In addition, the evidence showed that a 12 percent reduction in the salt marsh in Winnapaug Pond would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island. Moreover, the evidence indicated that the 12 percent loss of the total salt marsh filtering in the Winnapaug Pond will have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected to result in increased harmful nitrate levels within the pond. The evidence illustrated that high levels of nitrate in

> groundwater poses a public health threat because groundwater is the sole source of drinking water. Therefore, based on evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater, and based on the evidence that the [petitioner's] proposal would not be suitable for the locality of the subject property, this Court finds that the [petitioner's] proposal would constitute a public nuisance.

Pet. App. B10-B11.

3. The Supreme Court of Rhode Island affirmed. Pet. App. A1-A18.

a. The court first held that petitioner's takings claim was not ripe for review. Pet. App. A9-A12. It explained that

> although [petitioner] claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision. His 1966 and 1985 applications sought to fill the wetlands so he could construct a beach club. His 1963 and 1983 applications sought permission to fill the wetlands, with no statement describing what he intended to do with the land when it was filled. In fact, during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land. Because [petitioner] has not applied for permission to develop a seventy-four-lot subdivision, he has not received a "final decision regarding the application of the regulations to the property at issue."

Id. at A11 (quoting *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186 (1985)).

The court's ripeness holding was also based in part "on the fact that [petitioner] has not sought permission for less ambitious development plans." Pet. App. A11. The court stated that "[u]ntil [petitioner] has explored development options less grandiose than filling eighteen acres of salt marsh, he cannot maintain a claim that the CRMC has

deprived him of all beneficial use of the property." *Id.* at A11-A12.

b. While noting that its "determination that the claim was not ripe is dispositive of the case," the Rhode Island Supreme Court also "briefly discuss[ed] the merits of [petitioner's] claim." Pet. App. A12. The court sustained the trial court's finding that petitioner had not been deprived of all beneficial use of the property in question. *Id.* at A12-A13. The court relied on the "undisputed evidence * * * that had [petitioner] developed the upland portion of the land, its value would have been $200,000," and noted that petitioner's allegation of an anticipated profit of $3,150,000 was "speculative." *Id.* at A13.[2] The court also stated that "when [petitioner] became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Id.* at A15. Finally, the court held that petitioner could not establish a taking under the multi-factor test established by this Court's decision in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123-128 (1978), explaining that petitioner's "lack of reasonable investment-backed expectations is dispositive in this case." Pet. App. A17.

SUMMARY OF ARGUMENT

I. This Court has repeatedly held that a regulatory takings claim is generally unripe until the landowner has

---

[2] The court explained:

> It was revealed at oral argument that the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres. Further, there was no evidence that [petitioner] would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require. Thus, it is clear that his anticipated "profit" was unrealistically optimistic.

Pet. App. A13 n.7.

sought permission to develop his property and has received a final decision from the relevant land-use agency. As in other areas of administrative law, enforcement of ripeness principles protects the agency from premature judicial interference, and it ensures that if litigation is ultimately required, the reviewing court will have the benefit of the agency's expertise.

In the instant case, the Supreme Court of Rhode Island reasonably concluded that petitioner's takings claim was unripe. Petitioner's 1985 application for permission to construct a beach club did not propose any form of residential development, and it contemplated filling of a substantial majority of the wetlands on the parcel. Notwithstanding the agency's denial of that application, substantial uncertainty remains concerning the type and extent of development that would be permitted on petitioner's property. And because petitioner's 1985 beach club application bore no resemblance to the hypothetical subdivision that formed the basis of his takings claim, the trial court was forced to rely on extrinsic evidence regarding the manner in which the CRMC and other land-use regulators would likely have applied their rules to development proposals that petitioner never presented to the appropriate agency.

II. If this Court concludes that the Supreme Court of Rhode Island was required to regard petitioner's takings claim as ripe, that claim nevertheless fails on the merits. The current value of petitioner's property is many times the amount that SGI paid for it. Petitioner has wholly failed to demonstrate that Rhode Island's adoption of wetlands protective measures has caused any *diminution* in the value of his parcel; his claim is simply that the tract would have appreciated much more dramatically if development on the site were unrestricted. That claim, even if true, would be patently inadequate to establish a compensable taking.

The Supreme Court of Rhode Island noted that petitioner had acquired the subject property after the State's adoption

of the CRMP, and it treated that fact as an independent ground for rejecting petitioner's takings claim. We agree that where a purchaser chooses to acquire property that is subject to heightened regulatory oversight, application of the pre-existing regime does not subject the owner to the type of unfairness that must underlie a regulatory takings claim. That is especially so where, as here, the regulatory regime codifies background principles of public nuisance law. Petitioner contends that a person who acquires property after a regulatory restriction has been imposed thereby acquires the right to pursue any regulatory takings claim that the *prior* owner might have asserted. But plainly no general rule exists that every potential constitutional claim must be freely and fully assignable. In any event, petitioner has entirely failed to establish that SGI—the prior owner of the subject property—had any takings claim to assign.

ARGUMENT

As this Court recognized in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1028 n.15 (1992), "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." Rather, until the Court's decision in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), "it was generally thought that the Takings Clause reached only a 'direct appropriation' of property, or the functional equivalent of a 'practical ouster of [the owner's] possession.'" *Lucas*, 505 U.S. at 1014 (citations omitted). This Court has since concluded, however, that even where an owner is not divested of title to or possession of real property, land-use regulation may effect a compensable taking if it trenches too severely upon the prerogatives that have traditionally accompanied ownership. See *id.* at 1014-1019. In particular, regulation that deprives the owner of all economically beneficial use of land typically requires the payment of just compensation even though it does not involve a "direct appropriation" of the property involved.

Id. at 1015-1016.[3] In determining whether a regulatory measure goes "too far," thereby effecting a compensable taking, the court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 185 (1985).

The Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960); see also *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984). Where a landowner actively seeks to use his property, and is prevented from doing so by regulation so severe as to deprive the land of all beneficial use, the Fifth Amendment's just compensation requirement prevents the costs of that regulation from being unfairly concentrated on discrete individuals. In adjudicating claims for just compensation, however, courts should be cognizant of the danger that landowners with no actual interest in developing their property, or no realistic prospect of doing so, may hypothesize development activities that they know to be prohibited, and then seek "compensation" for the ban. A judicial order mandating payment in that circumstance would not serve to distribute more equitably the burdens of government regulation; it would confer a windfall upon a landowner who has in fact suffered no constitutionally cognizable injury, at the expense of the community as a whole.

In the instant case, petitioner's claim of a compensable taking is premised on the assertion that the State's regulatory scheme has prohibited him from constructing a

[3] The Court has similarly concluded that regulation will be deemed a per se taking if it entails a permanent physical occupation of real property. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 831-832 (1987); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 434-435, 441 (1982).

74-unit residential development on his parcel. Yet petitioner never submitted an application for any residential development, and nothing in the record suggests that petitioner had any actual desire or ability to undertake such a major project. Petitioner has also failed to establish (or even to allege) that the State's adoption of wetlands regulations rendered the subject property less valuable than it had previously been. Finally, those wetlands regulations, which are firmly rooted in background principles traditionally reflected in nuisance law, were already in effect when petitioner succeeded to ownership of the property in 1978. For each of those independent reasons, the judgment of the Supreme Court of Rhode Island should be affirmed.

I. THE SUPREME COURT OF RHODE ISLAND PERMISSIBLY HELD THAT PETITIONER'S CLAIM FOR JUST COMPENSATION WAS UNRIPE

A. This Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County*, 473 U.S. at 186; accord, *e.g.*, *MacDonald, Sommer & Frates* v. *Yolo County*, 477 U.S. 340, 351 (1986) ("Our cases uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it.").[4] That rule "responds to the high degree of discretion characteristically possessed

[4] A "facial" takings challenge—*i.e.*, a contention that the mere enactment of a statute or regulation effects a taking of property–is "generally ripe the moment the challenged regulation or ordinance is passed." *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 736 n.10 (1997). Such a challenge "face[s] an uphill battle" (*ibid.*), however, and petitioner does not contend that the mere enactment of the CRMP (or any predecessor wetlands protective measure) effected a taking of his property.

by land-use boards in softening the strictures of the general regulations they administer," which makes it particularly difficult for a court to assess the extent of development that will be permitted simply through inspection of the pertinent statutes and regulations. *Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997); see also *MacDonald*, 477 U.S. at 350.

At least in its general outlines, the Court's treatment of takings claims is consonant with ripeness principles that apply in other settings. In the context of the Administrative Procedure Act (APA), for example, this Court has held that

> a regulation is not ordinarily considered the type of agency action "ripe" for judicial review under the APA until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him.

Lujan v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990). The "basic rationale" of ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 148-149 (1967). Ripeness principles serve in part to protect the courts from involvement in litigation that might turn out to be unnecessary if the administrative process alleviates the plaintiff's concern. See, *e.g.*, *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 736 (1998); *FTC* v. *Standard Oil Co.*, 449 U.S. 232, 242 (1980). Adherence to those principles also ensures that if judicial involvement is ultimately required, the nature and practical consequences of agency policy will be clear to the reviewing court. See, *e.g.*, *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 164 (1967) ("judicial appraisal of [the relevant] factors is likely to stand on a much surer footing in the context of a specific application of this regulation than could be the case in the framework of the generalized challenge made here").

B. The instant case arises out of an inverse condemnation action filed by petitioner in a Rhode Island trial court. This Court has described as "unassailable" the general rule that "States may establish the rules of procedure governing litigation in their own courts." *Felder* v. *Casey*, 487 U.S. 131, 138 (1988). The application of state procedural rules to federal claims may be preempted if those rules "impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* at 150 (quoting *Brown* v. *Western Ry. of Ala.*, 338 U.S. 294, 298-299 (1949)).[5] State courts nevertheless have a degree of latitude to apply their own procedural rules to claims arising under federal law, even where state rules differ from those governing litigation in the federal courts, and even where the effect of a state rule is to preclude adjudication of a claim that a federal court would have found appropriate for resolution. See, *e.g.*, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977). Thus, in order to obtain reversal of the state court's ripeness holding, petitioner must demonstrate that some principle of federal law required the Supreme Court of Rhode Island to treat his takings claim as ripe, notwithstanding this Court's customary deference to state court procedural requirements. Petitioner has failed to make that showing.

---

[5] State courts may not refuse to adjudicate a federal cause of action based on disagreement with the content of federal law. See, *e.g.*, *Howlett* v. *Rose*, 496 U.S. 356, 371 (1990). But nothing of that sort has happened here. Petitioner raised takings claims under both the United States and Rhode Island Constitutions, see Pet. App. A2, and the Supreme Court of Rhode Island drew no distinction between the federal- and state-law claims.

C. Petitioner's takings claim is premised on the CRMC's denial of his 1985 application for permission to fill approximately 12 acres of wetlands to construct a beach club. See Pet. Br. 8 n.3. Notwithstanding the agency's denial of that application, however, "the nature and extent of permitted development" (*MacDonald*, 477 U.S. at 351) on petitioner's property remain far from clear. That application did not propose any form of residential development, and it contemplated filling of a substantial majority of the wetlands on the parcel. In addition, the 1985 beach club proposal did not involve any development of the upland segment of the property, which retained development potential even if all filling of the wetlands was prohibited.

Petitioner contends (Br. 13) that "the uncontradicted evidence was that CRMC *would* continue to deny [petitioner] permission to alter any of the 18 acres of wetlands, thereby precluding any development of that portion, but *would not* deny him permission to build one single-family home on the small upland portion of his property." He asserts on that basis that the "type and intensity of development legally permitted on [petitioner's] 18-plus acres of land is perfectly clear: one single-family home and nothing more." Pet. Br. 13 (internal quotation marks omitted). The record does not support that assertion.

The record contains evidence of at least *two* upland areas on petitioner's property. See Tr. 190-191, 199-200, 210-212, 610. Because petitioner never sought permission to undertake residential development on any portion of the land, neither the CRMC nor other relevant agencies (see pp. 16-17 & note 8, *infra*) were ever called upon to determine the extent of allowable construction. But there was surely a realistic prospect that petitioner might have received permission to build several houses on the upland areas of the site.[6]

[6] Nothing in the pertinent state court opinions is to the contrary. The trial court identified uncontradicted testimony indicating that one upland area was suitable for development and that the CRMC would have approved that location as a home site. Pet. App. B5, B9. The Supreme Court of Rhode Island likewise referred to "undisputed evidence in the record that it would be possible to build *at least* one single-family home on the existing upland area." *Id.* at A11 (emphasis added). Both the trial and appellate courts regarded that evidence as dispositive refutation of petitioner's takings claim. But neither court found that one single-family home was the *maximum* development that would be permitted on the property.

Even with respect to the wetlands portion of the subject property, the record does not establish that the CRMC's denial of petitioner's 1985 permit application was premised on an absolute ban on the placement of fill. The CRMP generally prohibits the filling of wetlands adjacent to Type II waters, see CRMP § 210.3C, but it expressly provides that "[s]pecial exceptions may be granted to prohibited activities to permit alterations and activities that do not conform with a Council goal for the areas affected or which would otherwise be prohibited by the requirements of [the CRMP]," *id.* § 130A. To receive a special exception under Section 130, the applicant must demonstrate, *inter alia*, that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." *Id.* § 130A(1).

The evidence at trial indicated that in dealing with a *different* applicant, the CRMC took the position that residential housing does not serve a "compelling public purpose" within the meaning of CRMP § 130A(1). See J.A. 73. The record does not make clear whether the CRMC regarded that principle as a categorical rule, or whether it was subject to possible exceptions (*e.g.*, where minimal fill in wetland areas would facilitate development of the uplands portion of a tract). Had petitioner truly been interested in making productive use of the wetlands portion of his tract, he could have devised an alternative project, perhaps involving less substantial filling activities, and then sought to persuade the CRMC that such a project qualified for a special exception

under CRMP Section 130A(1). For these reasons, the record in this case leaves significant doubt as to the type and extent of development that would have been permitted on petitioner's tract, including both its upland and wetlands portions.[7]

D. In other respects as well, the state courts' consideration of petitioner's takings claim would have been meaningfully assisted if petitioner had announced his intention to construct residential units and had sought the permits necessary to pursue that scheme. Most obviously, such applications could have provided some assurance that petitioner actually desired and had the means and technical capacity to undertake large-scale residential development.[8]

---

[7] Petitioner places substantial emphasis (see, *e.g.*, Br. 12) on the trial court's statement that "[petitioner] testified that the CRMC informed him that any proposal involving the filling of wetlands would be denied." Pet. App. B5. Even if the trial court's description of the evidence were accurate, petitioner's own hearsay testimony concerning the CRMC's likely response to a hypothetical development proposal would be a patently inadequate means of establishing the agency's formal and official position with respect to petitioner's land. In any event, the trial court's characterization of petitioner's testimony is inaccurate. Petitioner acknowledged on cross-examination that he had never submitted a permit application for residential development involving less than the full 18 acres of wetlands. See Tr. 111-113. Petitioner did present evidence concerning a discussion between himself and a CRMC biologist, who stated that even a more limited fill proposal (*e.g.*, for reduced residential development) would not be approved unless petitioner could establish that the project would result in public rather than purely private benefits. See Tr. 116-120. But petitioner clearly did not understand the agency to have expressed a categorical opposition to any filling on the wetlands segment of the parcel. To the contrary, the conversation in question occurred *before* petitioner submitted his 1985 beach club application. Tr. 120.

[8] Under Rhode Island law, an applicant's intended use is an essential part of his application, see CRMP § 300.1 (requiring that an applicant describe the "need" for the activity), and substantially different prerequisites and standards may apply depending on the nature of the proposed development. An applicant for a residential development permit must first obtain a local building permit and an individual sewage disposal system (ISDS) permit from the Rhode Island Department of Environmental Management. *Id.* §§ 300.3(B)(1) and (2), 320(C)(6). The ISDS permit application requires the landowner to submit a "topographic map of details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and, if necessary, also assessment on environmental impacts," as well as "various details on the septic system design" proposed. J.A. 51; see also J.A. 66.

Enforcement of ripeness principles thus helps to ensure that any takings award is truly "compensation" for actual injury to the landowner, rather than a windfall based on hypothetical development activities that would not have occurred even in the absence of the contested regulatory scheme.

In addition, if petitioner had identified large-scale residential development as the purpose of his proposed filling activities, the CRMC's consideration of his application might have identified other, independent barriers to that potential use of his parcel. The CRMC would likely have declined to consider petitioner's application for permission to conduct fill activities for residential development until he obtained the necessary septic and building permits. See J.A. 66-68; CRMP § 300.3(B); note 8, *supra*. The septic systems needed for a 74-unit residential development would have discharged significant amounts of nutrients into Winnapaug Pond. J.A. 56-57. Even a small increase in nutrient loadings could produce eutrophication, a condition in which growth of microorganisms leads to a lack of oxygen in the water, potentially harming shellfish stocks, causing fish kills, and causing a range of other harms. J.A. 83-90. The Supreme Court of Rhode Island also noted that the wetlands on petitioner's property "provide[] a buffer for flooding," Pet. App. A3, and testimony at trial indicated that filling the wetlands could increase flood risks to neighboring property and that houses and septic systems could become projectiles in a flood. Tr. 179-181, 567-568.[9]

---

[9] Petitioner suggests (Br. 3, 23, 42, 49) that construction of residences on filled wetlands has been a common practice in the area where his property is located, and that the effect of the CRMP is therefore to

This Court has made clear that any use of real property constituting a public or private nuisance under traditional state-law principles may be prohibited without the payment of compensation even if the effect of the ban is to deprive the land of all beneficial use. *Lucas*, 505 U.S. at 1029-1031; see also *id.* at 1035 (Kennedy, J., concurring in the judgment) (agreeing that "nuisance prevention accords with the most common expectations of property owners who face regulation," while stating that "[c]oastal property may present such unique concerns for a fragile land system that the State

---

deprive him of "development rights" that his neighbors have enjoyed. Those suggestions are not supported by the record. In the first place, even if petitioner or SGI might have had some *expectation* (at some point in the past) that they would at some point be able to engage in extensive filling of their coastal wetlands, it would not follow that they had obtained a distinct *property right* under state law to do so. In any event, at trial, petitioner acknowledged on cross-examination that, with possible isolated exceptions, the practice within the community has been to leave the marsh undeveloped. Tr. 98-99; see also Tr. 188-190. The aerial photographs submitted in Joint Lodging 2 confirm the largely undeveloped character of the surrounding wetland areas. A biologist's field report prepared in connection with petitioner's beach club application stated that "[t]he site of approx. 12± acres of fill is entirely *in* salt marsh bordering south shores of Winnapaug Pond. An estimation of total continuous salt marsh area at south shores of the pond is 220± acres, with an additional 100± acres at southwest shores. *That this wetland complex is large, continuous and has remained relatively non-fragmented despite development pressures in the area is important in its value assessment.*" Pl. Exh. 10, at 2 (emphasis added). Petitioner quotes the statement in the Biologist's Field Report that "[l]and uses of Winnapaug Pond/Atlantic Beach area are moderate-to-heavy density seasonal development, residential and commercial; development directly adjacent to this site is moderate density seasonal dwellings." Pet. Br. 3. Petitioner omits the final clause of that sentence, however, which states that "impacts are at present associated with development of buffering back dune areas to the north side of Atlantic Avenue." Pl. Exh. 10, at 2. The available evidence strongly indicates that while considerable development has occurred within the region as a whole, the *wetlands* areas have remained largely untouched. The case is therefore quite different from *Lucas*, where the landowner simply sought permission "to do what the owners of the immediately adjacent parcels had already done." 505 U.S. at 1008.

can go further in regulating its development and use than the common law of nuisance might otherwise permit"). If petitioner had sought permission to undertake the large-scale residential development that forms the basis for his takings claim, the court's consideration of the CRMC's "nuisance prevention" defense to petitioner's takings claim would have been significantly informed by the views of the expert agencies responsible for addressing potential nuisance activities in the State's sensitive coastal area regarding the likely impacts of that form of development. Cf. *Weinberger* v. *Salfi*, 422 U.S. 749, 762 (1975) (exhaustion requirement is "manifestly reasonable" where it allows the agency to determine whether the claims are "invalid for other reasons").

The trial court found that the filling of petitioner's 18 acres of wetlands *would* constitute a public nuisance, noting that this Court had stated in *Lucas* that the nuisance inquiry properly includes an analysis of "the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, *see, e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question." Pet. App. B10 (quoting *Lucas*, 505 U.S. at 1030-1031). Applying that analysis here, the trial court found that the filling petitioner proposed would constitute a nuisance because it "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island"; would "have a significant detrimental impact on the existing salt marsh filtering mechanisms within the pond which could be expected to result in increased harmful nitrate levels within the pond"; would therefore "pose[] a public health threat because groundwater is the sole source of drinking water"; and "would not be suitable for the locality of the subject property." *Id.* at B10-B11. The trial court's analysis of the nuisance question focused exclusively on the likely environmental effects of the filling itself; the

court did not assess the *additional* harms that might result (*e.g.*, through the operation of septic systems) from the construction and occupancy of a large residential subdivision.[10]

E. The method by which petitioner attempted to establish a taking thus predictably created the very ambiguities and inefficiencies that ripeness requirements are intended to avoid. If petitioner had actually sought permission to undertake the residential construction that now forms the basis for his takings claim, his application would have triggered formal agency processes focusing on that form of development, culminating in a final decision by the agency itself that could then have furnished the basis for judicial review. But because petitioner's 1985 beach club application bore no resemblance to the hypothetical residential subdivision, the trial court was forced to rely on extrinsic evidence regarding the manner in which the CRMC and other land-use regulators would likely have applied their rules to a development project that petitioner never presented to them. The requirement that a takings claimant obtain from the responsible agency a "final decision regarding the application of the regulations to the property at issue" before filing suit, *Williamson County*, 473 U.S. at 186, exists precisely to avoid the need for that sort of conjectural inquiry.

[10] Other preexisting restrictions on development of areas below mean high water and of the wetlands on the site further support the State's view that petitioner has no reasonable investment-backed expectation that he would be able to place fill on the site, and that prohibitions resulting from the CRMP are firmly rooted in state and federal law defining property and in background principles of nuisance law. A substantial portion of the site is below mean high water. Pet. App. A3; Tr. 463-479; Joint Lodging 2. That fact appears to render the Rhode Island public trust doctrine applicable, see Br. in Opp. 20, and also means that the federal navigational servitude applies. *Willink* v. *United States*, 240 U.S. 572 (1916). Moreover, since 1899, construction in navigable waters has been subject to the approval of the Army Corps of Engineers under Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 403; for purposes of that statute, the term "navigable waters" refers to areas below mean high water. *Willink*, 240 U.S. at 580; *Leslie Salt Co.* v. *Froehlke*, 578 F.2d 742, 748 (9th Cir. 1978). Finally, the placement of fill into wetlands that drain into bodies of water such as Winnapaug Pond requires federal approval under Section 404 of the Clean Water Act, 33 U.S.C. 1344, which was enacted in 1972. The regulation of such wetlands by the Corps of Engineers was based on an assessment that they, along with the body of water to which they are adjacent, are part of a single aquatic system and that pollution of the wetlands will affect the system as a whole. See *United States* v. *Riverside Bayview Homes*, 474 U.S. 121, 134-135 (1985).

II. PETITIONER CANNOT ESTABLISH A TAKING OF PROPERTY SIMPLY BY PROVING THAT HIS LAND WOULD DRAMATICALLY INCREASE IN VALUE IF DEVELOPMENT RESTRICTIONS THAT PREDATE HIS ACQUISITION OF THE LAND WERE ELIMINATED

If this Court nevertheless concludes that the Supreme Court of Rhode Island was required to regard petitioner's takings claim as ripe, that claim fails on the merits. In finding that petitioner had failed to establish the existence of a total taking, the superior court relied in part on evidence presented at trial indicating that the subject property would have a value of $200,000 if a single-family residence were constructed on the uplands portion. See Pet. App. B9-B10. That value is scarcely trivial in any absolute sense, and it is far more than petitioner and SGI initially paid for the property. Petitioner nevertheless seeks to establish the existence of a taking by comparing that amount to the value ($3,150,000) that he alleges the property would have if large-scale residential development were permitted. See, *e.g.*, Pet. Br. 40 (asserting that the CRMC's regulatory actions have "result[ed] in the 93.7% loss of present value" of petitioner's tract); *id.* at 37.[11] For the reasons that follow, that comparison is not an appropriate basis for a regulatory takings claim.

[11] Petitioner also suggests (Br. 46) that the denial of economically beneficial use of the wetlands portion of his tract is itself a sufficient basis for concluding that a taking has occurred. That claim fails for several reasons. First, petitioner has failed to demonstrate that the wetlands

A. This Court's decision in *Lucas* v. *South Carolina Coastal Council*, *supra*, strongly suggests that even a 93.7% diminution in the value of real property resulting from the imposition of new land-use restrictions is not sufficient to establish a categorical taking. The Court acknowledged that a "landowner whose property is diminished in value 95% * * * might not be able to claim the benefit of [the Court's] categorical formulation," and that "in at least *some* cases the landowner with 95% loss will get nothing." *Id.* at 1019-1020 n.8 (internal quotation marks omitted). That discussion indicates that even a drastic diminution in the value of real property is insufficient to establish a categorical or "total" taking, especially if the property retains some economically beneficial use. And there can be no doubt that construction of even a single house on a residential tract constitutes "economically beneficial" use of real property.[12]

---

areas are entirely unusable. See pp. 15-16, *supra*. Second, it is well-established that "total taking" analysis involves examination of the parcel as a whole. See, *e.g.*, *Dolan* v. *City of Tigard*, 512 U.S. 374, 385 n.6 (1994); *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993); *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 130-131 (1978). Though some applications of that rule may involve difficult line-drawing problems, see *Lucas*, 505 U.S. at 1016-1017 n.7, petitioner did not contend either in his brief to the state supreme court or in his petition for certiorari that the wetlands portion of his tract constituted a separate parcel. The pattern of development in the region—significant development in the upland areas, with the wetlands substantially untouched, see note 9, *supra*—belies any suggestion that wetland areas near Winnapaug Pond have traditionally been regarded as separate developable parcels. Furthermore, to the extent it is appropriate to assess the effect of state law on petitioner's predecessor, SGI, the entire tract acquired by SGI would have to be considered. As noted above, SGI sold a number of lots in that tract for homesites and thus was able to realize significant development potential from the outset.

[12] Invoking the phrase "economically viable use" in some of this Court's cases, petitioner argues that the State must allow development, even in wetlands that are not suited to development in their natural state, that would enable the owner to earn a positive return on his investment in the land. See, *e.g.*, Pet. Br. 42-44. This Court has never held that the Just Compensation Clause embodies such a guarantee. The phrase "economically viable use" was derived from *Penn Central*, where the challenged law required that the structure be used as a railroad terminal; in that setting, the Court simply noted that the owners could obtain relief if the ongoing operation of the building for that mandated purpose ceased to be "economically viable." See 438 U.S. at 138 n.36; cf. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 118 (1974) (describing claim of "erosion taking" resulting from limitations on discontinuance of unprofitable rail operations). The Court has not suggested any such principle outside the context of a specified use for an already existing structure. In *Lucas*, for example, the Court identified the relevant inquiry to be whether the landowner was deprived of all economically "beneficial" or "productive" use. See 505 U.S. at 1016 n.6, 1017, 1018. As we have explained in the text, petitioner has not been deprived of all beneficial or productive use of his land.

B. The more fundamental defect in petitioner's theory, however, is that the comparison on which he relies wholly fails to establish that the adoption of the CRMP caused his property to *diminish* in value. The superior court observed that "[petitioner] paid approximately $8,000 for the property acquired in 1959 and SGI paid approximately $5,000 for the property acquired in 1969. The evidence showed that SGI sold six individually buildable parcels of the property between 1959 and 1961." Pet. App. B12. Thus, the initial purchase price of the land at issue here was at most $13,000, less whatever amounts (which petitioner failed to establish at trial) SGI obtained from the sale of individual units within the original parcel. See also note 12, *supra*. Despite petitioner's oblique reference to the "fair market value of the property in its preregulated state" (Pet. Br. 37), petitioner has failed even to allege that his tract is worth less today than it was worth at some earlier point in time. The absence of evidence suggesting any diminution in value compels rejection of petitioner's takings claim.

1. The Supreme Court of Rhode Island treated the dissolution of SGI, and petitioner's consequent acquisition of title to the property, as a bona fide change in ownership, see Pet. App. A14, and it accordingly sustained the trial court's finding that petitioner "did not become the owner of the

parcel until 1978," *id.* at A15. The state court found that change in ownership to be an independent barrier to petitioner's takings claim; it explained that "when [petitioner] became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Ibid.* Although petitioner contests that aspect of the state court's analysis, he agrees (see, *e.g.*, Br. 43) that he acquired the property in 1978.

A transfer of real property from one owner to another typically occurs through a voluntary exchange for value. In that circumstance, we agree with the Supreme Court of Rhode Island that a regulatory takings claim ordinarily may not be predicated on a land-use restriction that predates the claimant's acquisition of the relevant property. The court's task in a regulatory takings case is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *Williamson County*, 473 U.S. at 199; see pp. 9-10, *supra*. Before a restriction on the use of property can reasonably be equated with outright appropriation, the owner must at the very least offer proof that he has been deprived of a right or interest that he previously possessed. Enforcement of land-use regulations that predate the owner's acquisition of the property do not have that effect.

Nor would recognition of a takings claim in that circumstance serve the values that the Just Compensation Clause was intended to protect. "The purpose of forbidding uncompensated takings of private property for public use is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986) (quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)). "[W]hile most burdens consequent upon government action under-

taken in the public interest must be borne by individual landowners as concomitants of the advantage of living and doing business in a civilized community, some are so substantial and unforeseeable, and can so easily be identified and redistributed, that justice and fairness require that they be borne by the public as a whole." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (internal quotation marks and footnote omitted); see also *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 835 n.4 (1987) (taking may occur if individual landowners are "singled out to bear the burden of [the State's] attempt to remedy" larger public problems). An individual who *chooses* to acquire (*e.g.*, environmentally sensitive) property that is subject to heightened regulatory oversight cannot plausibly claim that he has been "forc[ed] * * * to bear public burdens" or "singled out" by the government for unfavorable treatment.[13]

In the instant case, petitioner's acquisition of the subject property occurred "by operation of law," Pet. App. A14, rather than through an exchange for value. It is therefore less clear than in the usual case that petitioner *voluntarily* accepted the constraints on wetlands development imposed by the CRMP (though petitioner as sole shareholder was ultimately responsible for SGI's failure to file required reports, and thus for the corporation's dissolution). On the other hand, the fact that petitioner acquired the tract by operation of law rather than through a bargained-for exchange undermines any argument that he has a legitimate

---

[13] Petitioner relies in part (Br. 31-32) on cases holding that a recent purchaser of land may contest the validity of pre-existing restrictions on the use of the property. Petitioner errs, however, in analogizing an inverse condemnation suit to an attack on the validity of a zoning or other land-use regulation. The question whether a land-use restriction is lawful will rarely turn on whether the application of the rule is consonant with the expectations of a particular landowner. But the very essence of a claim for just compensation is the allegation that the government has "taken" a property right that the plaintiff previously possessed.

investment-backed expectation in being permitted to make a particular use of the property. Cf. *Hodel* v. *Irving*, 481 U.S. 704, 715 (1987) (finding it "dubious" that persons who succeeded by inheritance to fractional interests in Indian allotments of which they made no active use had any "investment-backed expectations"). In any event, because the restrictions on wetlands development imposed by the CRMP were in place at the time that petitioner acquired the parcel, no right that petitioner ever possessed in the land has been "taken" from him.

That is particularly so in light of the fact that the State has not required that petitioner's land be left "economically idle." *Lucas*, 505 U.S. at 1019. Petitioner does not and cannot contend that the property has been rendered valueless or incapable of any beneficial use; his claim is simply that the property is worth much less than it would be under a less restrictive regulatory regime. If such a comparison could ever provide a basis for a meritorious takings claim (but see p. 22, *supra*), it could only be in a case where the enactment of use restrictions that postdate the claimant's acquisition of the property disrupts the claimant's own legitimate expectations and causes the property to be much less valuable than at the time he acquired it.[14]

---

[14] Any effort to conduct the inquiry that petitioner advocates would also be likely to involve insuperable practical problems. The development restrictions imposed by the CRMP give all landowners in the area—including petitioner—a significant "reciprocity of advantage," *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415, by preventing the degradation of Winnapaug Pond and protecting the integrity of its adjacent resources. Cf. *Agins* v. *Tiburon*, 447 U.S. 255, 262 (1980) (rejecting plaintiffs' facial challenge to city zoning ordinances and observing that "[t]here is no indication that the [plaintiffs'] 5-acre tract is the only property affected by the ordinances," and that the plaintiffs "therefore will share with other owners the benefits and burdens of the city's exercise of its police power"). Petitioner surely could not establish a taking simply through proof that his tract would appreciate in value if *he* were permitted to engage in large-scale development while his neighbors remained subject to the CRMP's restrictions. Rather, any takings claim based on a comparative valuation

Petitioner contends both that (a) a landowner can demonstrate a "total" taking based on the effect of use restrictions that predate his ownership of the property, and (b) a "diminution" in value sufficient to establish a "total" taking can be established by comparing the property's current value not to its worth at some prior time, but to the hypothetical value it would have if an existing use restriction were eliminated. Acceptance of those propositions, taken together, would have extraordinary practical implications for land-use regulation. Petitioner's analysis logically implies that a person could purchase a tract of real property that was subject to pre-existing development restrictions (*e.g.*, land that was zoned for a particular use) and *immediately* establish a total taking simply through proof that the land would dramatically appreciate in value if the restrictions were eliminated. Nothing in this Court's decisions supports that result. Requiring the State to pay "compensation" in such cases would not protect individual landowners from being unfairly singled out for unfavorable treatment; it would offer windfall profits to persons who have suffered no actual injury as a result of longstanding regulatory restrictions, thereby encouraging speculators to game the system.

There is no occasion in this case, however, to consider whether (and, if so, in what circumstances) a taking may be found even though the restrictions on development predated the claimant's acquisition of the property. In this case, the restrictions in the CRMP codified, regularized, and formalized notice to landowners and the public of the application of principles that had long been reflected in Rhode Island's law of property and nuisance in the State's sensitive and hydrologically interconnected coastal areas. Indeed, the supe-

---

theory would require an assessment of the value petitioner's tract would have if *all* landowners in the region were permitted to engage in unrestricted wetlands development. It seems unlikely that any workable methodology could be devised for conducting that highly speculative inquiry.

rior court specifically concluded that the filling of petitioner's 18 wetlands acres would have constituted a public nuisance. Furthermore, the wetlands to which those restrictions are applicable are manifestly not suited to residential development in their natural state, and, in stark contrast to *Lucas*, see 505 U.S. at 1008, there has been no widespread filling and development of the comparably situated wetlands surrounding Winnapaug Pond. At least in these circumstances, the existence of the statutory restrictions at the time of acquisition must defeat a takings claim.

2. For the foregoing reasons, petitioner himself suffered no taking of property through application to his 1985 development proposal of the restrictions contained in the CRMP. Petitioner contends (Br. 33-34), however, that a person who acquires property after a regulatory restriction has been imposed thereby acquires the right to pursue any regulatory takings claim that the *prior* owner might have asserted. In effect, petitioner argues that a potential regulatory takings claim must "run with the land," in order to avoid any possibility that a taking will go uncompensated if the person who owns the property at the time of a new regulatory restriction is forced to sell (or otherwise alienate) it before the takings claim ripens. But plainly no general rule exists that every potential constitutional claim must be freely assignable.[15]

---

[15] *Nollan* (see Pet. Br. 22-23) is not to the contrary. In *Nollan*, the Court held that the California Coastal Commission had effected a taking by demanding an easement across the plaintiffs' beachfront property as a condition for permitting construction of a larger residence on the land. See 483 U.S. at 831-842. The Court held that the plaintiffs could assert a takings claim notwithstanding the fact that they had purchased the property after the Commission had begun to implement its easement policy. See *id.* at 834 n.2. The Court explained that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Ibid.* The "permanent physical occupation" of real property involved in *Nollan* (see *id.* at 831-832), however, constituted a per se taking without regard to its effect (or lack thereof) on the value of the land. See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982). Petitioner's takings claim, by contrast, necessarily depends on proof that the property has (at the very least) suffered a drastic diminution in value. The existence of any such diminution is most appropriately determined by reference to the value of petitioner's tract at the time he acquired it.

In any event, even if petitioner's theory were otherwise sound, it would have no application to the instant case. Petitioner has entirely failed to establish that SGI—the prior owner of the subject property—had any takings claim to assign. Even accepting the dubious premise that a substantial diminution in the value of real property can effect a categorical taking, petitioner identifies no evidence suggesting that the State's adoption of the CRMP in 1977 had any immediate impact on the worth of the land.

The absence of such evidence is unsurprising. The State of Rhode Island had closely regulated development in coastal wetlands well before the promulgation of the CRMP. And as we explain above (see note 9, *supra*), the record in this case indicates that only minimal filling of wetlands has occurred in the area surrounding petitioner's tract. In 1971 the CRMC denied SGI permission to engage in development activities substantially similar to those described in petitioner's 1983 and 1985 permit applications. The CRMP is as a legal and practical matter the logical outgrowth of prior efforts—including both regulatory measures and common-law nuisance principles—by the State of Rhode Island to prevent exploitation of environmentally sensitive regions from impairing the interests of adjoining landowners and of the general public.[16] Nothing in the record here suggests

---

[16] Insofar as the CRMP represents a codification of Rhode Island nuisance principles as applied to particular environmentally sensitive areas, its application to petitioner's tract would not effect a taking, even if the effect were to deny petitioner all economically beneficial use of the land. See *Lucas*, 505 U.S. at 1030 (explaining that it is "open to the State at any point to make the implication of * * * background principles of nuisance and property law explicit"). Codification of pre-existing nuisance

that the CRMP so dramatically altered the nature of the State's wetlands regulation as to undermine any legitimate expectations of SGI or effect a taking of SGI's property.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
MALCOLM L. STEWART
Assistant to the Solicitor General
WILLIAM B. LAZARUS
R. JUSTIN SMITH
Attorneys

JANUARY 2001

---

principles (and conferral of enforcement authority upon a state agency) may also enhance the individual landowner's "reciprocity of advantage" (see note 14, *supra*), by giving him greater assurance that other property owners will comply with restrictions intended to further the interests of the community.

(4)

No. 99-2047

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF RHODE ISLAND

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

DUANE J. DESIDERIO
CHRISTOPHER G. SENIOR
(Counsel of Record)
THE NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 - 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0200
Attorneys for Amicus Curiae.

Washington, D.C. • THIEL PRESS • (202) 328-3288

38pp

TABLE OF CONTENTS

Page(s)

INTERESTS OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE MERE EXISTENCE OF A REGULATION, ABSENT FURTHER REVIEW, SHOULD NOT END THE REQUIRED CONSTITUTIONAL ANALYSIS OF A TAKINGS CLAIM 5

A. The Rhode Island Supreme Courts' Cursory Analysis Effectively Writes Out Of Existence The Concept Of Regulatory Takings 6

B. Investment-Backed Expectations Are Best Utilized In Determining The Amount Of Just Compensation. 10

II. ADDITIONAL RE-APPLICATIONS, FOLLOWING SOME UNKNOWN NUMBER OF REGULATORY DENIALS, SHOULD NOT BE REQUIRED TO RIPEN A TAKINGS CLAIM 14

A. *MacDonald* Did Not Establish A Categorical Re-Application Requirement 17

B. The Re-Application Standard Defies Consistent Application By The Lower Courts 18

TABLE OF CONTENTS (Cont.)

Page(s)

C. The Court Should Adopt The "One Meaningful Application" Standard, Modified By A Futility Exception 22

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

CASES

Abbot Labs. v. Gardner, 387 U.S. 136 (1967) ...24, 25, 26

Agins v. City of Tiburon, 447 U.S. 255 (1980) 1, 2, 3

Carson Harbor Village Ltd.v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 9

City of Chicago v. International College of Surgeons, 522 U.S. 156 (1997) 15

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2, 18

City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va.), *cert. denied*, 525 U.S. 826 (1998) 6

Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461 (7th Cir. 1988).....2

Dodd v. Hood River County, 136 F.3d 1219 (9th Cir.), *cert. denied*, 525 U.S. 923 (1998) 15

Dolan v. City of Tigard, 512 U.S. 374 (1994) 14

Eastern Minerals Int'l, Inc. v. United States, 36 Fed. Cl. 541 (1996) 26

Florida Rock Indus. v. United States, 45 Fed. Cl. 21 (1994) 10

TABLE OF AUTHORITIES (Cont.)

Page(s)

Forseth v. Village of Sussex, 20 F.Supp. 2d 167 (E.D. Wisc. 1998), *aff'd in part, rev'd in part*, 199 F.3d 363 (7th Cir. 2000) 14, 19

Franklin v. Massachusetts, 505 U.S. 788 (1992) 25

Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, 135 F.3d 275 (4th Cir. 1998) 22

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991) 27

Good v. United States, 39 Fed. Cl. 81 (1997), 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S.Ct. 1554 (2000) .....*passim*

Grant v. South Carolina Coastal Council, 461 S.E.2d 388 (S.C. 1995) 6

Healing v. California Coastal Comm'n, 22 Cal. App. 4th 1158, Cal Rprtr. 758 (Cal. App. 2d) 27, 28

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) 23

Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989) 2

Hunziker v. Iowa, 519 N.W.2d 367 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995) 6

TABLE OF AUTHORITIES (Cont.)

Page(s)

Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261 (1997) 15

Kaiser Dev. Co. v. City and County of Honolulu, 649 F.Supp. 926 (D. Hawaii 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990), *cert. denied*, 499 U.S. 947 (1991) 21

Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir), *cert. denied*, 513 U.S. 870 (1994) 26

Kim v. City of New York, 681 N.E.2d 312 (N.Y.), *cert. denied*, 522 U.S. 803 (1997) 6

Kinzli v. City of Santa Cruz, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988) 26

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 12

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) .....*passim*

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) .....*passim*

McQueen v. South Carolina, 530 S.E.2d 628 (S.C. 2000).....6

TABLE OF AUTHORITIES (Cont.)

Page(s)

Nollan v. California Coastal Comm'n,
483 U.S. 825 (1987) 1, 9

Palazzolo v. Rhode Island,
746 A.2d 707 (R.I. 2000) .....*passim*

Penn Central Transp. Co. v. City of New York,
438 U.S. 104 (1978) 12, 28

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 9

River Park, Inc. v. City of Highland Park, 23 F.3d 164
(7th Cir. 1994).....2

San Diego Gas & Electric Co. v. City of San Diego,
450 U.S. 621 (1981) 1

Schulze v. Milne, 849 F.Supp. 708 (N.D. Cal. 1994),
aff'd in part, rev'd in part, 98 F.3d 1346
(9th Cir. 1996) 20

Shelter Creek Development Corp. v. Oxnard,
838 F.2d 375 (9th Cir. 1988) 28

Southview Assocs. v. Bongartz, 980 F.2d 84
(2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 20

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) .....*passim*

TABLE OF AUTHORITIES (Cont.)

Page(s)

2BD Ltd. Partnership v. County Comm'rs for Queen Anne's County, 896 F. Supp. 518 (D.Md. 1995),
aff'd, 162 F.3d 1158 (4th Cir. 1998).....20

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764
(9th Cir. 2000) 12

Unity Ventures v. County of Lake,
841 F.2d 770 (7th Cir. 1988) 26

Vatalaro v. Department of Envtl. Conservation,
601 So.2d 1223 (Fla. App. 1992) 8, 9

Wilkinson v. Pitkin County Bd. of Comm'rs,
142 F.3d 1319 (10th Cir. 1998) 15

Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985).....*passim*

OTHER SOURCES

Black's Law Dictionary (5th ed. 1979) 24

Brief of *Amicus Curiae* American Planning Association in Support of Respondent, *Suitum v. Tahoe Regional Planning Agency*, No. 96-243 .....21, 22, 27

Michael Berger, *The Ripeness Mess In Federal Courts, Or How The Supreme Court Converted Federal Judges Into Fruit Peddlers*, INST. ON PLANNING, ZONING AND EMINENT DOMAIN 7-1 (1991) 14

TABLE OF AUTHORITIES (Cont.)

Page(s)

Michael Berger, *Supreme Bait & Switch: The Ripeness Ruse In Regulatory Takings*, to be printed in 3 WASH U.J.L. & POLICY 99 (2000) 16

Brian Blaesser, *Closing The Federal Courthouse Door On Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988) 3

John Delaney and Duane Desiderio, *Who Will Clean Up the Ripeness Mess? A Call For Reform So Takings Plaintiffs Can Enter The Federal Courthouse*, 31 THE URB. LAW. 195 (1999) 2, 16

Timothy Kassouni, *The Ripeness Doctrine And The Judicial Relegation Of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992) 3

Testimony of Professor Daniel R. Mandelker on H.R. 1534, reprinted at 31 THE URB. LAW. 236 (Spring 1999) 18, 19, 27

Lynda Oswald, *Cornering the Quark: Investment Backed-Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91 (1995) 7

Gregory Overstreet, *The Ripeness Doctrine Of The Takings Clause: A Survey Of Decisions Showing Just How Far Federal Courts Will Go To Avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994) 3, 24

Paul Weiland, *Unfunded Environmental Mandates: Causes, Burdens, and Benefits* 22 HARV. ENVTL. L. REV. 283 (1998) 6

INTERESTS OF THE AMICUS CURIAE

The National Association of Home Builders ("NAHB") has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner. Letters of consent have been filed with the Clerk of the Court.[1]

NAHB represents over 200,000 builder and associate members throughout the United States. Its members include people and firms that construct and supply single family homes as well as apartment, condominium, commercial and industrial builders, land developers, and remodelers. It is the voice of the American shelter industry. NAHB, therefore, is concerned with any judicial decision that calls into question the remedy available to its members under the Fifth Amendment when land use regulators take private property for public use without the payment of just compensation.

NAHB has been before the Court as an *amicus curiae* or as "of counsel" to the landowner in a number of cases involving the rights of landowners to use their property and the remedy to be applied when those rights are interfered with. These include *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 (1981), *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986), *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987)[2], *Lucas v. South Carolina*

---

[1] No person or entity other than NAHB made any monetary contribution to the preparation or submission of this brief.

[2] The Court's opinion cited NAHB's brief. 483 U.S. at 840.

Coastal Council, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999).

SUMMARY OF ARGUMENT

The lower courts greet constitutional property rights cases with hostility.[3] When takings claims are presented to federal judges, their knee-jerk reaction is to cite this Court's ripeness opinions as an easy avenue for dismissal. Between 1990-98, for example, 83% of takings cases with a reported opinion from a U.S. district court were dismissed without ever reaching the merits. During that same time period, property owners who could afford to continue litigation before one of the U.S. Circuit Courts of Appeal saw 64% of their takings claims sacrificed on the ripeness altar. See John Delaney and Duane Desiderio, *Who Will Clean Up The Ripeness Mess? A Call For*

[3]See, e.g., *River Park, Inc. v. City of Highland Park*, 23 F.3d 164, 165 (7th Cir. 1994) ("Federal courts are not boards of zoning appeals. This message, oft-repeated, has not penetrated the consciousness of property owners who believe that federal judges are more hospitable to their claims than are state judges. Why they should believe this we haven't a clue; *none has ever prevailed in this circuit*....") (emphasis supplied); *Hoehne v. County of San Benito*, 870 F.2d 529, 532 (9th Cir. 1989) (court perceives its role as "the Grand Mufti of local zoning boards" and dismisses takings case); *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 467 (7th Cir. 1988) (takings claim is merely a "garden-variety zoning dispute dressed up in the trappings of constitutional law").

Reform So Takings Plaintiffs Can Enter The Federal Courthouse, 31 THE URB. LAW. 195, 203-204 (1999).[4]

Because federal courts have abdicated their responsibility to decide constitutional property rights cases, the takings clause is unfortunately unique. Except for the rare occasion when this Court agrees to hear a takings case, no other provision in the Bill of Rights depends almost entirely on the state court system to flesh-out its substantive meaning and requirements.

But state courts, following the federal courts' example, routinely sidestep the merits of takings claims as well. Here, for example, the Supreme Court of Rhode Island declined a thorough analysis of Mr. Palazzolo's request for just compensation simply because the wetland regulations at issue pre-dated his acquisition of the subject property. The Rhode Island courts believed that Mr. Palazzolo could not reasonably expect to develop his property because he must have known it would be regulated. But in today's regulatory climate, with hundreds of thousands of federal, state and local statutes and regulations purporting to protect the environment, who doesn't acquire property with the expectation that it will be regulated? Can anyone, from here on in, ever assert a viable regulatory takings

[4]The federal courts' avoidance of takings claims is a common subject of analysis. See also Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to avoid Adjudicating Land Use Cases*, 10 J. LAND USE & ENVTL. L. 91 (1994); Timothy Kassouni, *The Ripeness Doctrine and the Judicial Relegation of Constitutionally Protected Property Rights*, 29 CAL. W. L. REV. 1 (1992); Brian Blaesser, *Closing the Federal Courthouse Door on Property Owners*, 2 HOFSTRA PROP. L.J. 73 (1988).

claim? Under the reasoning of the Rhode Island courts, the answer is no.

Additionally, the Rhode Island courts determined that Mr. Palazzolo's takings claim is not ripe because he did not submit enough applications requesting permission to use his land. Mr. Palazzolo (and his corporate predecessor-in-interest) submitted four land use applications. Regulators denied them all, but the Rhode Island courts wanted more before it would deem the case ripe. How many more is anyone's guess.

Too frequently, lower courts rely on the date of acquisition and finality questions presented here as a quick and simple dodge out of the substantive and fact-intensive issues surrounding takings claims. The approach taken by the Rhode Island courts here—and innumerable other federal and state courts—relegates the takings clause "to the status of a poor relation." *Dolan v. City of Tigard,* 512 U.S. 374, 392 (1994). This case begs the Court to restore the takings clause to its rightful, equal place among the other protections in the Bill of Rights. To achieve this restoration, NAHB respectfully urges the Court to rule as follows:

- The date of statutory or regulatory enactment can not preclude the courts from deciding *whether* a land use agency has committed a taking in the first instance. The date of regulatory enactment may be a factor in determining the amount of just compensation due to a property owner, but it should not negate the very existence of a takings claim.
- When a citizen applies to use his property, his takings claim should ripen after (1) regulators have denied one "meaningful" application, and (2) he seeks a single waiver or variance that allows relief from the denial—

unless (3) following such procedures would be futile in terms of receiving the requested relief. Denial of a single land use application does not mean that a taking has in fact occurred. Rather, denial of one application should simply mean that a takings claim is ripe for a court to decide on the merits.

ARGUMENT

I. THE MERE EXISTENCE OF A REGULATION, ABSENT FURTHER REVIEW, SHOULD NOT END THE REQUIRED CONSTITUTIONAL ANALYSIS OF A TAKINGS CLAIM.

In concluding that Mr. Palazzolo suffered no regulatory taking, the court below found that because "there were already regulations in place limiting [the Petitioner's] ability to . . . develop[ ]" his property, he could have no investment-backed expectations and therefore suffered no taking. *Palazzolo v. Rhode Island*, 746 A.2d 707, 717 (R.I. 2000). The court below quoted with favor the Federal Circuit's opinion in *Good v. United States*, with particular emphasis on the finding that, "In view of the regulatory climate that existed when [the landowner] acquired the subject property, [the landowner] could not have had a reasonable expectation that he would obtain approval . . . to develop the land." *Id.* (quoting *Good,* 189 F.3d 1355, 1361-62 (Fed. Cir. 1999)).

Once the regulations in question were adopted, the court below declared, the State of Rhode Island had removed from the title to the property "the right to fill wetlands," thus leaving Mr. Palazzolo with no further right to develop his land. *Palazzolo*, 746 A.2d at 710. The mere enactment of the regulations were enough to extinguish

property rights in the parcel, precluding any possible recovery for a taking.

A. The Rhode Island Supreme Court's Cursory Analysis Effectively Writes Out Of Existence The Concept Of Regulatory Takings.

The seemingly simple proposition laid out by the Rhode Island Supreme Court - if you acquire property under regulatory burden your investment-backed expectations cease to exist - has devastating results. For what parcel of land in the United States today does not fall under the rubric of some regulatory scheme? "Between 1968 and 1978 Congress passed more regulatory statutes than it had in the nation's previous 179 years."[5]

As previously noted, courts are extremely reluctant to resolve the merits of takings claims, and have effectively used the ripeness hurdle to keep cases from their courtrooms. When that evasion won't work, what better way to get the plaintiff out of the courthouse than by telling her, "sorry, your property is regulated, and therefore you have no takings claim."

Courts have already shown such plaintiffs out the courthouse door.[6] Many have followed the "logic" in

---

[5]Paul Weiland, *Unfunded Environmental Mandates: Causes, Burdens, and Benefits*, 22 HARV. ENVTL. L. REV. 283, 287 (1998).

[6]See *McQueen v. South Carolina*, 530 S.E.2d 628 (S.C. 2000); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Kim v. City of New York*, 681 N.E.2d 312, 314-16 (N.Y.), *cert. denied*, 522 U.S. 803 (1997); *Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391

Good, where the court concluded that, "In light of the growing consciousness of and sensitivity toward environmental issues, [the landowner] must also have been aware that standards could change to his detriment." *Good*, 189 F.3d at 1363. Some might say this 'test' requires citizens to become regulatory psychics, peering into their crystal balls to divine how their property might be regulated so they might take whatever steps were necessary to protect their distinct, investment-backed expectations. Or, as the Supreme Court of Rhode Island appears to have done to Mr. Palazzolo's land, this 'test' may simply add a new clause to every deed in America reading, "Property subject to uncompensated regulatory seizure at any time – purchase at your own risk."

One legal commentator has described this regulatory nullification of property rights as follows:

> If we accept the premise that enactment of one piece of legislation puts a property owner "on notice" that more restrictive regulations might be enacted in the future as well, we find ourselves faced with a *reductio ad absurdum* – the exsitence of the first regulation will defeat any claims the owner might have regarding the sanctity of the property interest in the future. By merely enacting one regulation (even a relatively non-intrusive one that is clearly a legitimate exercise of the police power), the government opens a path for eventual, incremental taking of the entire property interest without payment of compensation.

(S.C. 1995); *Hunziker v. State*, 519 N.W.2d 367, 371 (Iowa 1994), *cert. denied*, 514 U.S. 1003 (1995).

Lynda Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 114 (1995).

Here, the Supreme Court of Rhode Island even added a novel twist. In noting that this Court recognized the limitations "that background principles of the State's law of property and nuisance already place upon land ownership," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992), the Court below declared that governmental regulations have exactly the same effect. "[W]here the regulation predated the landowner's acquisition of the property, 'the bundle of rights which [the landowner] acquired upon obtaining title to the property did not include the right to develop the lots without restrictions.'" *Palazzolo,* 746 A.2d at 716 (citation omitted).

The end result is that any owner acquiring property already regulated has no possibility of a takings claim. "Regardless of whether the government physically takes property in the form of an easement or promulgates regulations restricting the property's use, all subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original owner." *Id.* at 716-717.

By equating physical and regulatory takings, the *Palazzolo* court failed to note one substantial difference: an owner acquiring property knows the specific parameters of a physical taking and can easily factor its impact into his investment-backed expectations. An owner acquiring property under a regulatory scheme will often not know the parameters of these regulations *until they are actually applied to his property*. While there is surely some element of risk involved in any land purchase, the degree

of uncertainty in any regulatory scheme is vastly more difficult to ascertain than one involving a physical taking.

The vast majority of regulatory takings claims arise in the context of as-applied challenges, because the full impact of a regulation can usually be quantified only when it is applied to a particular parcel. "Even after [the agency] has issued a jurisdictional declaratory statement . . . it remains to be determined whether the permit will be granted . . . [for] no taking occur[s] until [the agency] deni[es the applicant's] permit application." *Vatalaro v. Department of Envtl. Conservation*, 601 So.2d 1223, 1229 (Fla. App. 1992). Indeed the Ninth Circuit has recognized that an owner acquiring property after the adoption of a regulatory scheme may have an as-applied challenge available to address any injury suffered. See *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468 (9th Cir. 1994).

By treating the ability to develop land as a privilege under the exclusive domain of the state, the Supreme Court of Rhode Island appears to have forgotten the words of this Court in *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987): "[T]he right to build on one's property – even though its exercise can be subjected to legitimate permitting requirements – cannot remotely be described as a 'governmental benefit.'"

If the holding of the court below stands, there will be no constitutional relief for property owners stripped of their rights by application of a regulation, no matter how severe the consequences. The Fifth Amendment will apply almost exclusively to physical appropriation of property. Justice Holmes oft-quoted statement, "The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393,

415 (1922), will take its place in present day constitutional analysis as simply another great dissent.

B. Investment-Backed Expectations Are Best Utilized In Determining The Amount Of Just Compensation.

As this case and others indicate, courts can tie property owners in knots over the degree to which distinct, investment-backed expectations must be negatively impacted by a regulation in order for a taking to be found at all, much less in order to prove some level of compensation. As Judge Smith of the Federal Court of Claims has described, this debate can often reach absurd heights:

> The notion that the government can take two-thirds of your property and not compensate you but must compensate you if it takes 100% has a ring of irrationality, if not unfairness, about it. If the law said that those injured by tortious conduct could only have their estates compensated if they were killed, but not themselves if they could still breathe, no matter how seriously injured, we would certainly think it odd, if not barbaric. Yet in takings trials, we have the government trying to prove that the patient has a few breaths left, while the plaintiffs seek to prove, often at great expense, that the patient is dead. This all-or-nothing approach seems to ignore the point of the Takings Clause.

Florida Rock Indus. v. United States, 45 Fed. Cl. 21, 23 – 24 (1999).

This almost surreal legal battle underscores why takings jurisprudence would be better served if distinct,

investment-backed expectations played two roles rather than one: as a simple threshold requirement, where proof of deprivation of economically viable use of property would be enough to show a taking; then as a central component of the debate over compensation, where each side would be free to battle over how much – if anything – should actually be awarded.

Such a two-step analysis makes use of the investment backed expectations concept where it works best – as a tool to assess the amount of just compensation.

Rather than forcing plaintiffs to show the 'death' of all investment-backed expectations to prove governmental *liability* for a takings claim, a plaintiff should be required to show only the existence of distinct, investment-backed expectations and evidence indicating the degree to which they have been frustrated. The government, at this threshold stage, could present evidence challenging the degree of impact, or the validity of the expectations in the first place.

However, instead of battling over percentages of loss and the full impact of the regulation upon the property, here a court would need only ascertain that 1) distinct investment-backed expectations exist, and that 2) they have been frustrated because the property owner has been denied the ability to put his land to economically viable uses.

Should the takings claim also meet the remaining *Penn Central* tests and any other applicable hurdles, only then would the court turn its attention to the actual, compensable amount that is due and owing to the property owner.

Such an analysis would greatly simplify the initial review of a regulatory takings claim. Rather than fight over what is essentially the specific degree of loss up front,

the parties would only reach such a level of detail when all other factors have been addressed.

Of course, this Court would need to set some guidelines as to what 'quantifiable degree' of loss triggers further analysis.

In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), this Court found that physical appropriation of a tiny fraction of a building for installation of cable television equipment was a taking. While such a specific, stringent standard need not be adopted here, this Court must suggest some reasonable parameters.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court found that no taking had occurred, in part, because the plaintiff's "primary expectation concerning the use of the parcel" was not frustrated. *Id.* at 136. Conversely, where a plaintiff's "primary expectations" for his property are indeed frustrated, it is reasonable to expect that his investment-backed expectations have also been frustrated. In the present case, Mr. Palazzolo's inability to develop his property for residential use – his primary expectation – has been frustrated. Utilizing the proposed test, this evidence should be enough to show sufficient impact on investment-backed expectations to pass the initial threshold test for a regulatory takings claim. Detailed analysis of actual loss of compensable value would take place only after a court found all other applicable takings tests fully satisfied.[7]

---

[7] The difference between deprivation of use leading to a taking, and computation of loss of value for purposes of calculating compensation is one of the issues which has bedeviled other courts, which consistently confuse the two. See e.g, *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 216 F.3d 764, 780-81 (9th Cir. 2000)("The central confusion centers on the relationship between the 'use' of property and its 'value.' Clearly, the economic value of property provides strong evidence of the availability of "economically beneficial or productive uses" of that property. . . Many cases treat the "use" and "value" interchangeably, or speak only of the effect of a regulation on the property's value.") Cf. *Tahoe Regional Planning Agency*, 520 U.S. 725, 749 ("[T]he relevant issue is the extent to which use or development of the land has been restricted.")(Scalia, J., concurring)

Frustration of primary expectation of use is but one possible factor in a threshold review of investment-backed expectations, but certainly a reasonable one well-grounded in existing precedent. With this Court's guidance, other similar threshold tests focusing on deprivation of use could be established which would further assist courts nationwide in more effectively analyzing investment-backed expectations in the manner proposed here.

Meeting this threshold would not, of course, guarantee recovery. Once a court finds a taking, the parties would engage in a substantially more detailed presentation of evidence indicating the specific degree of loss, taking into account actual valuations, market realities, and the degree of risk involved. Even when a fully-compensable physical taking was found in *Loretto*, the actual loss per building was largely insignificant due to the tiny amount of property involved. Such an outcome is even more likely in the considerably more speculative and uncertain world of land development. But whatever the actual award, the court would focus on investment-backed expectations as a

central issue only after a claim has reached the compensation stage of review.

By clarifying the role of investment-backed expectations during the first stage of a takings claim, this Court will simplify the process of review of a regulatory takings claim and remove the more detailed analysis of loss to the compensation stage where it more properly belongs.

II. ADDITIONAL RE-APPLICATIONS, FOLLOWING SOME UNKNOWN NUMBER OF REGULATORY DENIALS, SHOULD NOT BE REQUIRED TO RIPEN A TAKINGS CLAIM.

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997), was the last time the Court considered the "prudential ripeness principles"[8] for a takings claim. The case at bar presents a question unanswered by *Suitum*: When a landowner's initial application to use property is denied, do the prudential ripeness elements require the submission of additional applications—and an unknown number of denials—before a takings claim becomes fit for judicial review? *See Id.* at 738, n. 12.

The "ripeness mess" traces its genesis to *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473

---

[8]520 U.S. at 733. The Seventh Circuit understands *Suitum* as "distinguishing *Williamson*'s prudential ripeness requirements from ripeness requirements drawn from Article III limitations on judicial power." *Forseth v. Village of Sussex,* 199 F.3d 363, 368 n. 7 (7th Cir. 2000). See also *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1012-1013 (1992) (takings ripeness requirements are "prudential" in nature).

U.S. 172 (1985). See Michael M. Berger, *The Ripeness Mess in Federal Courts, Or How The Supreme Court Converted Federal Judges Into Fruit Peddlers,* INST. ON PLANNING, ZONING AND EMINENT DOMAIN 7-1 (1991). *Williamson County* established a two-part ripeness test for takings claims. First, regulators must deliver a final decision "regarding how [a landowner] will be allowed to develop its property that represents a definitive position...inflict[ing] an actual, concrete injury on the property owner." 473 U.S. at 191, 192. Second, a property owner must exhaust available state remedies that would provide adequate compensation for a taking. *Id.* at 194-95.[9]

---

[9]If this Court did not grant *certiorari,* Mr. Palazzolo would likely be forever precluded from having a federal court review the merits of his takings claim. While the Court "has frequently acknowledged the importance of having federal courts open to enforce and determine federal rights," *Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 293 (1997) (O'Connor, J., concurring), the doors of the federal courthouse are slammed shut on nearly all takings claimants. This is because lower courts construe *Williamson County* prong 2—the state compensation prong—as requiring property owners to litigate their takings claims in state court *first* under a state law inverse condemnation theory. Once state court litigation is completed, federal courts avoid deciding constitutional property rights claims under the preclusive doctrines of *res judicata* or collateral estoppel. See, e.g., *Dodd v. Hood River County,* 136 F.3d 1219, 1227 (9th Cir), *cert. denied,* 525 U.S. 923 (1998) (following state court litigation on inverse condemnation under Oregon law, "it was fair and efficient for the district court to decide the Dodds are precluded from relitigating" their takings claim in federal court); *Wilkinson v. Pitkin County Bd. of Comm'rs,*

Mr. Palazzolo's situation implicates *Williamson County* prong 1—the final decision prong. He (or his corporate predecessor-in-interest) submitted four applications between 1962-1985 to fill wetlands on his property. Every time, state environmental regulators denied the applications. Every time, the regulators would have permitted the construction of only one home on the parcel's upland portion. See *Palazzolo,* 746 A.2d at 710-711. Despite the four permit denials, the Supreme Court of

---

142 F.3d 1319, 1325 n.4 (10th Cir. 1998) (*Williamson County* prong 2 "may, in actuality, almost always result in preclusion of federal claims....It is difficult to reconcile the ripeness requirement of *Williamson* with the laws of [issue and claim preclusion])." The system is further stacked against takings claimants because municipal defendants can tactically *remove* Fifth Amendment cases to federal court when it suits their purposes. See *City of Chicago v. International College of Surgeons,* 522 U.S. 156 (1997). Illogically, however, *Williamson* prong 2 is interpreted as requiring plaintiffs to always initiate suit in state court. In any event, "the synergy between the preclusion doctrines and current ripeness rules is that property owners are *forced* to litigate their constitutional takings claims in state court, without ever receiving a federal adjudication on the merits." Delaney and Desiderio, *supra* at 2-3, 31 THE URB. LAW. at 200-201 (emphasis in original). See also Michael Berger, *Supreme Bait & Switch: The Ripeness Ruse In Regulatory Takings,* to be printed in 3 WASH. U.J.L. & POLICY 99 (2000) ("When property owners follow *Williamson County* and first sue in state court, they are met in some federal circuits with the argument that the state court litigation, far from *ripening* the federal cause of action, instead has *extinguished* it. Under these courts' reasoning, the state proceedings are *res judicata*, and thus bar the pursuit of the now-ripened federal action") (emphasis in original).

Rhode Island decided that Mr. Palazzolo's takings claim was unripe because he never received a "final decision" on how he could use his land. The court so ruled because Mr. Palazzolo never re-applied for "less ambitious," "less grandiose" development plans. *Id.* at 714.

A. *Macdonald* Did Not Establish A Categorical Re-Application Requirement.

The Rhode Island courts divined a categorical need for re-applications from *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), where the Court wrote:

> [A]ppellant has submitted one subdivision proposal and has received the Board's response thereto [*i.e.*, a denial]. Nevertheless, appellant still has yet to receive the Board's "final, definitive position regarding how it will apply the regulations at issue to the particular land in question."

Id. at 352-353 (quoting *Williamson County,* 473 U.S. at 191). The *MacDonald* Court further opined that the takings claim before it was unripe because regulators did not provide a "final and authoritative determination of the type and intensity of development legally permitted on the subject property." *Id.* at 349.

"*MacDonald* suggest[s] that the *Williamson County* 'final decision' requirement *might sometimes* require multiple proposals or variance applications before a landowner's case will be considered ripe." *Suitum,* 520 U.S. at 738, n.12 (emphasis added). This is a far cry from the unconditional requirement, imposed by the Supreme Court of Rhode Island and other courts, that multiple applications are *always* required to ripen takings claims. In fact, four Justices dissented in *MacDonald* because they

feared the majority opinion could be interpreted as a re-application mandate. Justice White wrote: "Nothing in our cases...suggests that the decisionmaker's definitive position may be determined only from explicit denials of property owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that decision." *MacDonald,* 477 U.S. at 359 (White, J., dissenting.) Thus, the dissent expressly refused to "import[] a re-application requirement into the 'final decision' analysis." *Id.*[10]

B. The Re-Application Standard Defies Consistent Application By The Lower Courts.

MacDonald's four dissenting Justices were prescient. The judiciary's treatment of the re-application gloss on ripeness is "riddled with obfuscation and inconsistency." Testimony of Professor Daniel R. Mandelker on H.R. 1534, *reprinted at* 31 THE URB. LAW. 234, 236 (Spring 1999) (hereafter, "Mandelker Testimony"). The poster child for re-application reform is probably *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* 526 U.S. 687 (1999). "The city, in a series of repeated rejections, denied proposals to develop the property, each time

[10]The Court "noted probable jurisdiction" in *MacDonald* to address the "importan[t]...question [of] whether a monetary remedy in inverse condemnation is constitutionally required in appropriate cases involving regulatory takings...." 477 U.S. at 348. While that was the question it wanted to decide, it became sidetracked with ripeness issues.

imposing more rigorous demands on the developers." *Id.* at 694.[11]

While the property owners in *Del Monte* ultimately overcame the city's ripeness objections after nine years of

[11]Professor Mandelker summed-up the endless carousel of roundabout negotiations that the *Del Monte* property owners faced before they litigated the merits: "In 1981, the property owners submitted a subdivision proposal to build 344 residential units. The plan was rejected, and city planners informed that a plan for 264 units would be reviewed favorably. The owners then submitted a plan for 264 units; city planners rejected it, and informed that a plan for 224 units would be reviewed favorably. The owners then submitted a plan for 224 units; city planners rejected it, and informed that a plan for 190 units would be reviewed favorably. The owners then submitted a plan for 190 units; city planners rejected it, and the owners appealed to the city council. The city council found the plan 'conceptually satisfactory,' and granted a conditional 18-month use permit to commence construction for the project. Subsequently, the developer worked with planning board staff to meet the city council's conditions for the 190-unit development. Staff recommended approval of the site plan, but the planning board overrode staff's recommendation and issued a denial. The property owners then appealed this decision to the city council, which this time denied the site plan for 190 units. Meanwhile, a sewer moratorium was imposed, a request to extend the special use permit was rejected, and the permit expired. The local officials thus expected the developer to start from square one. Following this Kafkaesque process, the federal district court dismissed a takings claim for lack of ripeness, but the appellate court then reversed. *See* 920 F.2d at 1502-1506." Mandelker Testimony, *reprinted at* 31 THE URB. LAW. at 237-38.

negotiation and litigation, the land use labyrinth they navigated is not unique. Consider the following:

- *Forseth v. Village of Sussex,* 20 F.Supp.2d 1267, 1272 (E.D. Wisc. 1998), *aff'd in part, rev'd in part,* 199 F.3d 363, 366 (7th Cir. 2000): Three subdivision plats submitted. Plaintiff should have pursued a variance from an "offensive condition" that required him to convey a two-acre strip of land to the adjoining land owner—who also happened to be the Village Board President voting on the application—for the President's own private use at considerably less than fair market value.
- *Good v. United States,* 39 Fed. Cl. 81, 101-103 (1997), *aff'd,* 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied,* 120 S.Ct. 1554 (2000): Over a nine year period, eight applications were submitted to federal and state agencies to build a subdivision. Although the U.S Army Corps of Engineers ultimately denied the application for a wetlands permit, the decision was not "final" under *Williamson County* and *MacDonald* because "neither the Clean Water Act nor Corps regulations limit plaintiff's ability to submit a new application reflecting a different, less intensive plan."
- *2BD Ltd. Partnership v. County Comm'rs for Queen Anne's County,* 896 F. Supp. 518 (D.Md. 1995), *aff'd, remand,* 162 F.3d 1158 (4th Cir. 1998): In addition to seeking federal and state permits to build a travel plaza, plaintiff submitted at least three site plan applications to local officials for approval.
- *Schulze v. Milne,* 849 F. Supp. 708, 709 (N.D. Cal. 1994), *aff'd in part, rev'd in part on other grounds,* 98 F.3d 1346 (9th Cir. 1996): Property owners submitted a total of 13 revised plans to renovate their home. Each

plan was "in compliance with all applicable zoning laws," yet local officials "refused to approve the plan, and instead informed plaintiffs that there were additional requirements, not found in any zoning or other statutes, which plaintiffs had yet to meet."

- *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993): Takings claim unripe because landowner did not "attempt to modify the location of the units or otherwise seek to revise its application." Court provided no indication of how many re-applications would be necessary, or what type of development regulators would approve, before the takings claim would ripen.
- *Kaiser Dev. Co. v. City and County of Honolulu,* 649 F. Supp. 926, 940, 941 n. 19, 942 n. 21 (D. Hawaii 1986), *aff'd,* 898 F.2d 112 (9th Cir. 1990), *cert. denied,* 499 U.S. 947 (1991): After "beat[ing] their heads against a stone wall" and receiving "several final rejections" to develop beachfront land, takings claim nonetheless dismissed as unripe because "potentially profitable uses," for which the landowner never applied, existed on the property—such as agriculture, private riding academies, private recreation camps, a cemetery, private utilities, and aquaculture.

The American Planning Association (APA) understands that this judicial disarray sends a clarion call for this Court to clarify takings ripeness requirements. Accordingly, the APA, whose national membership largely includes land use planning professionals that work for governmental bodies, has urged the Court to dispense with the re-application concept:

> It must be recognized that the reapplication requirement invites local government to create a

> more complicated and time consuming review and approval process. It is, in fact, an open invitation for some local governments to do mischief. Unscrupulous officials can and often do easily assert, after the fact, that they "would have been willing" to consider an intensity of use or an alternative type of use that the landowner never proposed. This is plainly unfair and an abuse of the reapplication rule and is why such a rule is unrealistic and should no longer be required to demonstrate ripeness for adjudication.

Brief of *Amicus Curiae* American Planning Ass'n in Support of Respondent, *Suitum v. Tahoe Regional Planning Agency,* No. 96-243, at 13 (hereafter "APA *Suitum* Brief").

In short, all too often the re-application process causes landowners to "pass[] through procedural purgatory" only to "wend[] [their] way to procedural hell." *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal,* 135 F.3d 275, 284 (4th Cir. 1998). This Court now has the opportunity to clarify *MacDonald* and reconsider the statements which lead some to mistakenly believe that an unknown number of re-applications and denials is always necessary to yield a ripe takings claim.

C. The Court Should Adopt The "One Meaningful Application" Standard, Modified By A Futility Exception.

There is nothing ambivalent about Rhode Island's treatment of Mr. Palazzolo's applications. The record lacks evidence that would lead him to believe he would have received a permit to fill *any* amount of wetlands. Nor should he be required to blindly guess whether a

hypothetical future application for some lesser amount of fill would receive administrative approval. When the applications to fill 18 acres were denied, his injury became concrete enough, and the administrative decision became sufficiently final, for the limited purpose of ripening his constitutional grievance. Accordingly, "[t]he demand for finality is satisfied by [Mr. Palazzolo's] claim,...there being no question here about how the 'regulations apply to the particular land in question.' " *Suitum,* 520 U.S. at 739 (quoting *Williamson County,* 473 U.S. at 191).

Under *Williamson County,* a final decision arises when the "*initial* decisionmaker" delivers a "definitive position on the issue that inflicts an actual, concrete injury ...." 473 U.S. at 192 (emphasis supplied). Accordingly, as-applied regulatory takings claims have been considered unripe where a property owner did not: (1) submit initial development plans for approval in the first instance;[12] (2) submit to an available process to obtain a permit that may allow development[13]; or (3) once an initial application has

---

[12]See *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (because property owners "ha[d] not submitted a plan for development of their property as the [challenged] ordinances permit[ted], there [was] as yet no concrete controversy regarding the application of the specific zoning provisions").

[13]See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1011-13 (1992) (had a "special permit procedure" to the Coastal Council, for the purpose of determining permanent deprivations of viable land uses, been available to petitioner, he would have been required to pursue those avenues for a ripe takings claim)

been denied, apply for a variance or waiver from applicable land use regulations.[14]

All of these avenues require some regulatory body to act in an adjudicative capacity. In each situation, the parties present evidence (often in the context of a public hearing). Thereafter, an administrative agency is called upon to issue some judgment, determination, or decree relevant to the factual findings it made. *See* BLACK'S LAW DICTIONARY at 39 (5th ed. 1979) (definition of "adjudication").[15]

---

[14]A variance permits a land use that is otherwise prohibited. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n,* 452 U.S. 264, 297 (1981) (as-applied claim unripe because "[t]here is no indication in the record that appellees ha[d] availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting...a variance from the [applicable provisions of the Act]"; *Williamson County,* 473 U.S. at 193 (the developer must "resort to the procedure for obtaining variances ... [and obtain] a conclusive determination by the Commission whether it would allow" the proposed development).

[15]For example, a variance "provides relief from the application of a land use regulation....For this reason, the granting of a variance is an adjudicatory function' ....Given the rationales for the ripeness doctrine, the final decision prong *must be limited to adjudicatory relief.* In essence, the ripeness doctrine requires that the land use agency adjudicate the permissible uses of a given parcel of property." Gregory Overstreet, *The Ripeness Doctrine of the Takings Clause: A Survey of Decisions Showing Just How Far Federal Courts Will Go to Avoid Adjudicating Land Use Cases,* 10 J. LAND USE & ENVT'L L. 91, 111 (1994) (emphasis supplied).

For ripeness purposes, full completion of one land use adjudication process—namely, submission of an application, then pursuit of an available variance, and denial of each—would amply satisfy any reviewing court's pragmatic need for ripeness[16]. Denial of that application and/or variance causes an injury to the landowner on *that* request, and would not lead reviewing courts to "entangl[e] themselves in abstract disagreements...." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-49 (1967). Initial denial would not mean that a taking has in fact occurred, but simply that a reviewing court can conduct its typical review to determine whether the administrative record for that particular decision supports the finding of a taking on the merits.

While a *re*-application would yield a second final decision and a second distinct injury, it would not further perfect the regulators' "definitive position" from denial of the first application and variance. See *Williamson County,* 473 U.S. at 193. A landowner's pursuit in Round 2 (or Rounds 3 or 4 or 5) would do nothing to "formalize[]...[the] effects" he feels in a "concrete way" from denials in Round 1. See *Abbott Labs.,* 387 U.S. at 148-49. See also *Franklin v. Massachusetts,* 505 U.S. 788,

---

[16] NAHB submits that denial of an application, followed by denial of a variance, is sufficient for finality purposes to ripen a takings claim. Often, however, the doctrine of exhaustion of administrative remedies will require a property owner to pursue further avenues reasonably available under local ordinances, such as an appeal for review by a city council or a board of zoning appeals. See *Williamson County,* 473 U.S. at 192 (discussing differences between doctrines of finality and exhaustion of administrative remedies).

797 (1992) ("[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties").

Admittedly, under the proposed standard, issues will likely arise as to whether a particular application is "meaningful."[17] In the takings arena, however, any ripeness standard will likely require future litigation to flesh-out its meaning. Setting a single application/variance benchmark will lend much needed certainty to landowners, regulators and courts who, right now, have no objective starting point for determining when "enough is enough" for prudential ripeness purposes. Indeed, NAHB's suggested standard furthers the Court's instruction that the finality element for ripeness must be interpreted "in a pragmatic way." *Abbott Labs. v. Gardner*, 387 U.S. at, 149-50 (1967). Moreover, a body of precedent is developing to explain the one meaningful application requirement and the courts are becoming accustomed to

---

[17]Regardless of the re-application issue, the property owner's claim in *MacDonald* was arguably unripe because he did not even submit a single "meaningful" application to develop his parcel. "The Board found numerous reasons why appellant's tentative subdivision map was neither 'consistent with the General Plan of the County ... nor with the specific plan of the County ... embodied in the Zoning Regulations for the County." *MacDonald*, 477 U.S. at 342. The County rejected the tentative subdivision map because it failed to provide basic elements for a viable and safe land use plan, such as access to a public street, sewer and water hook-ups, and police protection. *Id.* at 343. How could MacDonald's tentative subdivision map have been "meaningful" when it was inconsistent with the county's master plan for land use, and did not provide the most basic public services?

the standard. See *Eastern Minerals Int'l, Inc. v. United States*, 36 Fed. Cl. 541, 548 (1996); *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1232 (9th Cir.), *cert. denied*, 513 U.S. 870 (1994); *Unity Ventures v. County of Lake*, 841 F.2d 770, 775 (7th Cir. 1988); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 484 U.S. 1043 (1988).

While submission of one meaningful application is a useful guidepost to initiate the ripeness inquiry, there may be situations where submitting an application or pursuing a variance would be a futile act. Justice White recognized that while a "landowner must pursue reasonably available avenues that might allow relief, it need not take...patently fruitless measures." *MacDonald*, 477 U.S. at 359. The First Circuit applies a futility exception "where the degree of hardship that would be imposed by waiting for the permit process to run its course is so substantial and severe, and the prospects of obtaining the permit so unlikely, that the property may be found to be meaningfully burdened and the controversy concrete enough to warrant immediate judicial intervention." *Gilbert v. City of Cambridge*, 932 F.2d 51, 61 n. 12 (1st Cir. 1991). *See also* APA Suitum Brief at 21 ("the 'futility' exception should *always* apply after one application has been made for a land use approval or administrative relief....") (original emphasis).

A California appellate case best reflects the need for a futility exception in the regulatory takings context. In *Healing v. California Coastal Comm'n*, 22 Cal. App. 4th 1158, 27 Cal. Rptr. 758 (Cal. App. 2d 1994), the Coastal Commission denied a permit for a one-story, three bedroom home, "where it had not received a recommendation from a non-existent board as to whether the property should be restricted from development under

a non-existent program for acquisition and set-asides of lots in the Santa Monica mountains." Mandelker Testimony, reprinted in 31 THE URB. LAW. at 238. The state argued that the property owner's takings claim was unripe for failure to pursue these unavailable procedures. The court, however, ultimately found the claim ripe and remarked:

> It is in the nature of our work that we see many virtuoso performances in the theaters of bureaucracy, but we confess a sort of perverse admiration for the Commission's role in this case. It has soared beyond both the ridiculous and the sublime and presented a scenario sufficiently extraordinary to relieve us of any obligation to explain why we are reversing the judgment. To state the Coastal Commission's position is to demonstrate its absurdity.

Healing, 27 Cal Rprtr. at 764. But see *Shelter Creek Dev. Corp. v. Oxnard*, 838 F.2d 375, 379 (9th Cir. 1988) (requiring application under an *unavailable* ordinance).

To summarize, NAHB respectfully urges the Court to adopt a futility exception to the one meaningful application/variance standard. On a case by case basis, a property owner would bear the burden to convince a court that it would be "patently fruitless" under all of the circumstances to submit an application or pursue a variance. Such an approach would be fully consistent with the Court's recognition that the very nature of takings claims raises "essentially ad hoc, factual inquiries." *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 127 (1978).

III. CONCLUSION

NAHB respectfully requests this Court to rule that Mr. Palazzolo should not be (1) precluded from litigating the merits of his takings claim simply because the regulations at issue pre-dated the acquisition of his property, and (2) required to re-submit some additional number of land use applications to ripen his takings claim.

November 22, 2000

Respectfully submitted.

DUANE J. DESIDERIO
CHRISTOPHER G. SENIOR*
**Counsel of Record*
THE NATIONAL ASSOCIATION
OF HOME BUILDERS
1201 15th Street, N.W.
Washington, D.C. 20005
(202) 822-0200

Attorneys for Amicus Curiae

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

NOV 24 2000

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND ex rel. PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Rhode Island

BRIEF OF THE INSTITUTE FOR JUSTICE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9494

INSTITUTE FOR JUSTICE
*WILLIAM H. MELLOR
CLINT BOLICK
SCOTT G. BULLOCK
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. THE TAKINGS CLAIM OF A SUCCESSOR IN TITLE IS ALWAYS JUDGED BY THE SAME STANDARDS THAT ARE APPLIED TO HIS PREDECESSOR IN TITLE 6

A. All Relevant Principles of Property Law Treat the Transferee of Property in Privity with his Transferor 6

B. The Decision of the Rhode Island Court Below is Fundamentally Inconsistent with this Court's Decisions in *Nollan* and *Lucas* 9

C. Federal and State Courts Should No Longer Be Allowed to Depart from the Teachings of *Nollan* and *Lucas* 15

II. PALAZZOLO'S CLAIM IS RIPE FOR HEARING ON THE CURRENT RECORD 20

III. THE SUPREME COURT OF RHODE ISLAND HAS EVISCERATED THE CONSTITUTIONAL REQUIREMENT OF JUST COMPENSATION FOR REGULATORY TAKINGS THAT DEPRIVE LANDOWNERS OF ALL BENEFICIAL ECONOMIC USE 24

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 23

Armstrong v. United States, 364 U.S. 40 (1960) 13

Carson Harbor Village Ltd. v. City of Carson, 37 F.3d 468 (9th Cir. 1994) 16

City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750 (1988) 20

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 1, 21

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1982) 4, 21

Florida Rock Indus. Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 26

Freedman v. Maryland, 380 U.S. 51 (1965) 20

Grant v. South Carolina Coastal Council, 461 S.E.2d 388 (S.C. 1995) 11

Greenbriar, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) 23

Hawaiian Housing Authority v. Midkiff, 467 U.S. 229 (1984) 14

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 26, 29

Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) 17

Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993) 16

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 18

TABLE OF AUTHORITIES – Continued

Page

Loveladies Harbor Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 26

Lovell v. City of Griffin, 303 U.S. 444 (1938) 20

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999) 23

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 25

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 3, 9, 11, 12, 15, 17

Olson v. United States, 292 U.S. 246 (1934) 9

Palm Beach Isles Association v. United States, 208 F.3d 1374 (Fed. Cir. 2000) 11, 26, 29

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 14, 15, 26, 29

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 13

Preseault v. United States, 100 F.3d 1525 (Fed. Cir. 1996) 11, 15, 18, 19

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 23

United States v. General Motors, 323 U.S. 373 (1945) 9

Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 4, 20, 23

TABLE OF AUTHORITIES – Continued

Page

CODES AND STATUTES

Rail Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) 19

MISCELLANEOUS PUBLICATIONS

American Law of Property (J. Casner ed., 1952) 7

Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135 (1918) 7

Ralph E. Boyer, et al., *The Law of Property: An Introductory Survey* (4th ed., 1991) 6

Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Restraints*, 8 J. Legal Stud. 49 (1979) 13

Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 27

A. M. Honoré, *Ownership in Oxford Essays on Jurisprudence* (A.G. Guest ed., 1961) 9

Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* (1998) 26, 28

Patrick J. Rohan, *Real Property: Practice and Procedure* (1981) 7

INTEREST OF THE AMICUS CURIAE

The Institute for Justice is a nonprofit, public interest law center committed to defending the essential foundations of a free society through securing greater protection for individual liberty and restoring constitutional limits on the power of government. Central to the mission of the Institute is strengthening the ability of individuals to control and transfer property and demonstrating that property rights are inextricably connected to other civil rights.

The Institute's brief is co-authored with Professor Richard Epstein of the University of Chicago Law School, one of the nation's leading authorities on property law. The Institute also filed along with Professor Epstein *amicus curiae* briefs in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, among other important takings cases before this Court. The Institute's brief in this case addresses both the jurisdictional and substantive questions concerning regulatory takings.

The parties in this case consent to the filing of *amicus curiae* briefs in support of their respective positions and letters memorializing such consent have been filed with the clerk.[1]

STATEMENT OF THE CASE

The facts of this case have been well set out in the Petitioner's principal brief, so that only a short summary of them is offered here. This land use dispute swirls around a parcel of land consisting of eighteen acres of marshlands and wetlands, plus a few additional acres of uplands that had been independently developed. In 1959,

---

[1] Counsel for the parties in this case did not author this brief in whole or in part. No person or entity, other than *amicus curiae* Institute for Justice, its members, and its counsel made a monetary contribution to the preparation and submission of this brief.

Mr. Palazzolo formed a corporation, Shore Gardens Inc. (SGI), with two partners, Natale and Elizabeth Urso. In 1961, he acquired their fractional interests to become sole shareholder of SGI. In 1963, SGI sought a state permit to fill in the submerged portions of the parcel; after this was denied, SGI renewed its original application in 1966. That application was approved in 1971, only to be revoked seventeen days later. Also in 1971, Rhode Island transferred all of its state powers over marshlands and wetlands to the Coastal Resources Management Council ("CRMC"), P.L. 1971, ch. 279, codified as G. L. 1956 chapter 23, title 46. In 1977, the CRMC issued comprehensive regulations – the Coastal Resources Management Program – that provided that coastal wetlands could be only filled after obtaining a special exemption from the CRMC. In 1978, Rhode Island's Secretary of State, in an unrelated action, revoked SGI's corporate charter so that the property devolved on Mr. Palazzolo in his individual capacity. Thereafter, Mr. Palazzolo renewed SGI's earlier application to fill in the wetlands in 1983 and 1985, the latter of which was denied in 1986. That last denial by the CRMC became the basis of Petitioner's inverse condemnation action, also filed in 1986, in which he alleged that he could *only* make beneficial use of his wetlands if he were allowed to fill in his *entire* parcel. At a 1997 bench trial, the trial judge held that Rhode Island's actions did not constitute a regulatory taking for which compensation was owed under the Fifth Amendment. That decision was affirmed by the Supreme Court of Rhode Island, 746 A.2d 707 (R.I. 2000). This Court granted certiorari on three interrelated questions:

> 1. Whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.
>
> 2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim.
>
> 3. Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.

SUMMARY OF ARGUMENT

This case raises the important question of at what point in time can an aggrieved property owner obtain judicial review of a takings claim when the owner's proposed use of his land has been authoritatively denied by the relevant land use agency. Incredibly, the Supreme Court of Rhode Island ruled that the doctrine of estoppel makes Palazzolo's challenge too late, and the doctrine of ripeness makes it too early. The Supreme Court of Rhode Island found that Petitioner's challenge to the order came *too late* because Mr. Palazzolo obtained title to the land in his individual capacity only in 1978 after the state had issued the regulations that stymied his development. Rhode Island contends that in light of the climate at the time of the passage, he could not have held any reasonable investment-backed expectations of developing his land. This position is flatly inconsistent with this Court's decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833, n.2 (1987), which noted that "[s]o long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot."

As *Nollan* requires, Rhode Island must treat all subsequent owners as being in privity with the original owner of the property, so that any and all rights that the former owner had against the government are transferred to the new owner with the property unless specifically retained. That rule holds in the instant case where the transfer resulted from the involuntary dissolution of the corporation. It also applies with equal force to all voluntary

transfers by sale, exchange, gift, lease, mortgage, will or inheritance. One of the prized attributes of land ownership is the ability to alienate it to higher valued uses. The integrity of the real estate market can be preserved only if the new owner is allowed to "stand in the shoes" of his predecessor in title; otherwise, free exchange routinely carries with it the destruction of constitutional rights. Accordingly, CRMC's 1978 regulations can withstand a takings clause challenge from Mr. Palazzolo only if they could withstand a challenge brought by his predecessor in title, the corporation SGI.

The Supreme Court of Rhode Island also held that Petitioner's suit came too soon because the CRMC has not rendered the "final decision" on Mr. Palazzolo's application needed to make the case ripe for review. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985). That well-established rule is itself highly problematic insofar as it induces state land use agencies to bog down a landowner's application with endless requests for further information in order to delay making the definitive decision that triggers judicial review. Rhode Island has taken this controversial principle one dangerous step further by insisting that the CRMC decision was not final because Petitioner might still reapply for "a less ambitious use" of the property, even though he had consistently asserted that his use would be economically viable *only* if he were allowed to fill in the entire land.

If the decision below is allowed to stand, Rhode Island and other states can cleverly avoid judicial review *in perpetuity* simply by standing ready to consider the new proposals for development that the landowner is unwilling to make. The apparent generosity of agencies thus postpones land use decisions until the owner drops from financial exhaustion. So long as state agencies need not pay interim damages for the delays their conduct induces, *see First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1982), they have at

their fingertips a painless way to evade their constitutional obligations to compensate for interim takings.

Finally, Rhode Island has adopted an approach as to what counts as a deprivation of all beneficial economic use that likewise *universally insulates* the state from any obligation to compensate when it imposes an outright ban on the development of privately owned wetlands. Any landowner may *always* make an open-space gift that will generate a tax deduction, in this case for a stated $157,000. The federal tax deduction cannot be allowed to excuse the state from its own obligation to pay just compensation – that is, full market value – for land it acquires under a regulatory taking.

Likewise, the Supreme Court of Rhode Island is surely incorrect in holding that the prior sale and development of an upland portion of the original tract requires a landowner to forfeit all compensation when all development is wholly prohibited on an adjacent wetland. This position is indistinguishable from one that allows the state to seize without compensation the remainder of a unified tract of land because part of it has been previously sold. That grotesque position mocks the Fifth Amendment by making the constitutional obligation of compensation turn on such inessential fortuities as to whether two plots of land were acquired at the same time or by the same entities.

Indeed, the conceptual difficulties in this area will remain so long as this Court continues to hew to the view that one set of rules apply to complete losses of economic value and a second, more lenient, set of rules apply to partial diminution in value. The only way to clear out this logjam is to apply the *same* rules to both partial and complete takings, so that the *Lucas* rules for total takings are extended to partial takings.

ARGUMENT

I. THE TAKINGS CLAIM OF A SUCCESSOR IN TITLE IS ALWAYS JUDGED BY THE SAME STANDARDS THAT ARE APPLIED TO HIS PREDECESSOR IN TITLE.

A. All Relevant Principles of Property Law Treat the Transferee of Property in Privity with his Transferor.

Land is permanent, but people are mortal. Of necessity, land passes through the hands of large numbers of individuals in a wide range of voluntary and involuntary transactions. It is routinely transferred by sale, exchange, lease, mortgage, gift or will. In this case the subject property was involuntarily distributed from Petitioner's solely owned corporation to the Petitioner when Rhode Island's Secretary of State ordered the dissolution of SGI. Land can also be transferred by the order of a bankruptcy court, by a property settlement incident to a divorce, or by a court-ordered partition of joint tenancy. Indeed, for all real estate, the typical question is not whether it will be transferred, but when it will be transferred. But no matter when or how that transfer takes place, the obligations of the state under the takings clause have traditionally been and should be left unaltered by any change in the identity of the owners of the land.

The soundness of this basic proposition of takings law is well illustrated by the analogous rules that govern adverse possession. Adverse possession is the set of rules that determines when any person who wrongly takes possession of the land of another (the quintessential taking) is able to obtain over time perfect title to the land, even against its original owner. *See* Ralph E. Boyer, et al., *The Law of Property: An Introductory Survey* 49 (4th ed. 1991). The operation of all systems of adverse possession is tied to the operation of a statute of limitations, which must run before the adverse possessor is able to claim an unencumbered title. One key rule in deciding whether or

not the appropriate statute of limitations has run concerns the operation of "tacking" for parties who are "in privity" so that one party takes by voluntary transfer the full interests of his predecessor in title.

To see how this privity rule applies, suppose that A takes land by adverse possession from O, and three years before the expiration of a 10 year statute of limitations, transfers that property by deed or will to B. The law in every jurisdiction holds that the voluntary transfer from A to B does not restart afresh the statute of limitations period for O's benefit. Rather, B steps in the shoes of A and need continue to hold the land only for three years to get the benefit of the 10 year statute of limitations. Any other rule results in a perversion of the basic statutory scheme. The purpose of an adverse possession rule is to quiet title by removing stale claims and to render land fit for conveyance. Henry W. Ballantine, *Title by Adverse Possession*, 32 Harv. L. Rev. 135, 135-36 (1918). A and B are said to be *in privity* so that B can *tack* his own period of occupation onto the prior period of A. *See American Law of Property* § 15.10 (J. Casner ed., 1952); Patrick J. Rohan, *Real Property: Practice and Procedure* § 2.06 (1981). To advance the free alienation of land, O's claim is barred after 10 years of continuous occupation whether A transfers the land to B or keeps it himself.[2]

---

[2] The disregard of the privity rule creates weird incentives that disrupt the sound operation of the real estate market. If both A and B know the legal situation, they may postpone an otherwise beneficial transfer in order to protect A's title from O's: why should B accept a 10-year exposure when A had only three years to go to perfect title? Yet if that property is worth $200 to B and $150 to A, then the inability to go forward with the transaction results in a social loss of $50. Alternatively, if A and B are ignorant of the legal rule, then the refusal to tack B's period of occupation onto A's gives O an undeserved windfall, while forcing A and B to the expense of sorting out the loss between them should O prevail in the 15th year after he lost possession. Worse still, if B transfers the property to C, the

In this case, the state asks this Court to reject this sensible and well-established privity rule in the context of eminent domain. It insists that anyone who acquires title to property after the adoption of a complex regulatory scheme cannot protest its imposition against him. But nowhere do they justify the fetters that this unfortunate rule places on the alienation of private property. The analogy to the adverse possession cases is precise. Suppose that X owns land worth $150 to him and $200 to Y. Ordinarily, X will sell the land to Y for a social benefit equal to $50 less the cost of sale. But once the state's land use regulation may be challenged only by X, and not by Y, then the market shrinks or shuts down. Y will be leery of purchasing land that could become worthless in his hands solely because he has bought it. A valuable voluntary transaction is therefore undone by an unsound rule that against all reason treats a sale from X to Y as though it were a gift of X's takings claim to the state. Only by treating buyer and seller in privity is this ridiculous result avoided. Now Y stands in the shoes of X and can raise whatever objections that were available to the original owner. The state is not prejudiced in its administration of the legal scheme because it can defend its regulation against Y just as it could against X. No longer is land kept in idle or unproductive use. The situation, moreover, hardly improves in those cases, such as this one, when the transfer of title is brought about by operation of law. The new record owner should not be forced to forfeit his constitutional protections under the takings clause solely because of events utterly beyond his control.

---

limitation period will start yet again. The more rapid the movement in real estate, the more costly the rejection of tacking under the privity rule. The only sensible rule holds that O's position is not improved by any voluntary transfer by A or any of his successors in title.

B. The Decision of the Rhode Island Court Below is Fundamentally Inconsistent with this Court's Decisions in *Nollan* and *Lucas*.

The Petitioner's reliance on the standard rules of privity and tacking has already received explicit and resounding endorsement in this Court's decision in *Nollan*. Footnote 2 reads:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.
> 483 U.S. 825, 833, n.2.

This principle makes perfectly good sense as a matter of both contract and constitutional law. The normal rules for the ownership of property do not refer to the "vulgar and untechnical" reference to the physical thing that is subject to ownership. Rather, under this Court's decisions it has been construed "in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors*, 323 U.S. 373, 377-378 (1945). *See generally* A. M. Honoré, *Ownership in Oxford Essays on Jurisprudence* 107 (A.G. Guest ed., 1961).

The interplay between the incidents of use and disposition is brought into high relief in this case. For the sake of argument, assume that land offers its owner two components of value. The first is the ordinary use value of the land – which includes not only the current uses but also includes "all the uses for which it is suitable." *Olson v. United States*, 292 U.S. 246, 255 (1934). The second is a possible takings claim against the government when and if the state seeks to restrict that present or otherwise suitable use. The contract question is whether X transfers to Y his right of action against the government along with the title to the land. In answering that question, the first

place to look is the agreement itself. If it transfers any right of action against the state from X to Y, that should dispositively establish that the takings claim was so transferred. No court should rule that this sensible business assignment of claims violates some undefined public policy. Typically, however, the parties do not address this issue, so law must adopt the *default* rule that best reflects their joint intention. That task is discharged by asking what rule is likely to maximize the value of their joint holdings at the conclusion of the transaction.

A moment's reflection makes it clear that virtually all parties would choose to allocate any future takings claim to the buyer. The passage of the restriction is only the first step in a complex process of regulation that may or may not run the course to completion. Yet in all cases it is the buyer, not the seller, who will have to let the state onto the premises to inspect the land; it is the buyer, not the seller, who must negotiate with the state about the scope of any future restrictions; it is the buyer, not the seller, who will have the best information on the adverse effects that the regulation has on his proposed plans for development. It makes no sense for the parties to allocate the takings claim to the former owner who has no knowledge of the particulars of the dispute, no ongoing interest in the property, and who may not even be alive or in the jurisdiction at the time that the dispute ripens. As a matter of constitutional law, therefore, any compensation owing should be determined on the assumption that the buyer and seller wished, as they are perfectly entitled to do, to preserve against the government their full rights under the takings clause. The appropriate default rule therefore must be that the takings claim rides through all voluntary and involuntary transfers.

The state will surely argue, as it did below, that its position is supported by the passage in *Lucas v. South Carolina Coastal Council* that states: "Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of

the owner's estate shows that the proscribed use interests were not part of his title to begin with." 505 U.S. 1003, 1027 (1992). That position surely implies that both the original owner and his successor in title are equally subject to the constraints of the nuisance law. It also implies that any servitudes that attach as a matter of general law, e.g., the navigation servitude, attach with equal force to the successor in title. *See, e.g., Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1383-1384 (Fed. Cir. 2000).

The state's position, however, goes far beyond the principle that this Court enunciated in *Lucas*. It claims that wetlands regulations consciously adopted by Rhode Island for its own advantage count as part of these background conditions and thus stripped Petitioner of all development rights before he acquired title to the land. In light of footnote 2 in *Nollan*, however, the only sensible reading of the passage in *Lucas* – one that gives due weight to its last three words – is "that the proscribed use interests were not part of his *chain of* title to begin with." The Rhode Island court, however, mangles this passage from *Lucas* by writing "when Palazzolo became the owner of this land in 1978, state laws and regulations already substantially limited his right to fill wetlands. Hence, the right to fill wetlands was not part of the title he acquired." *Palazzolo*, 746 A.2d at 716; *see also Grant v. South Carolina Coastal Council*, 461 S.E.2d 388, 391 (S.C. 1995) (making similar mistaken holding).

This bald proposition, however, begs the essential question for it presupposes what is in issue, namely, that the regulations are valid in the first place. But if the regulations are themselves *invalid* because their application would lead to an uncompensated taking under *Lucas*, then Palazzolo *rightly* expects that he will be able to challenge them once the state turns down his permit application. The theory of reasonable expectations is a two edge sword that protects the *legitimate* expectations of the landowner at least as much as the regulatory ambitions of the state. *See Preseault v. United States*, 100

F.3d 1525 (Fed. Cir. 1996). *Preseault* decisively *rejected* the government's position

> that an owner's subjective expectations of keeping or losing her property under various possible scenarios define for that owner the extent of her title. Just the reverse is true. It is the law-created right to own private property, recognized and enforced by the Constitution, legislation, and the common law that gives the owner an historically rooted expectation of compensation. The expectations of the individual, however well- or ill-founded, do not define for the law what are that individual's compensable property rights.
>
> *Id.* at 1540.

The Rhode Island Court repeated that same error in this case in its blatant attempt to short-circuit *Lucas*'s entire apparatus for evaluating regulatory takings claims. After eviscerating footnote 2 in *Nollan*, the Rhode Island Court writes as though knowledge that the regulation has been promulgated ipso facto destroys the property rights of all subsequent transferees. In so doing, the court badly misconstrues the relevant factors under *Lucas* for deciding when a total destruction of economic use amounts to a compensable taking of land. *Lucas* looked explicitly to state *nuisance* law, and it cited extensively to the provisions of the *Restatement (Second) of Torts* §§ 826-831. It also noted that "[i]t seems unlikely that *common-law* principles would have prevented the erection of any habitable or productive improvements on petitioner's land." *Lucas*, 505 U.S. at 1031 (emphasis added). At no point did *Lucas* mention a single *statutory* provision that might have bound the subsequent transferee but not the original owner. To the contrary, *Lucas* stressed that "when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking." *Id.* at 1019.

The Constitution does not have one takings clause for beach land adjacent to water and another takings clause for land below water. *Lucas*'s emphasis on the Restatement and common law principles covers both cases, and it is wholly incompatible with the claim that any statutory or administrative concoction, whatever its content, automatically defeats any takings claim brought by transferees who acquire title thereafter.

There are, moreover, good structural reasons for singling out, as *Lucas* does, statutory rules for special scrutiny. The traditional common law of nuisance does not seek to privilege the position of the state against some fraction of its citizens. Rather, its general pronouncements apply equally to all landowners against all others, and thus does not have any disproportionate impact of one land owner against another. *See Armstrong v. United States*, 364 U.S. 40, 49 (1960). Its purpose is to maximize the value of all parcels of land by protecting each against the invasions of others while allowing all to make reasonable use of their own property. In those cases where the law relaxes the physical invasion requirement, e.g., those of lateral support, it again does so for the advantage of both parties. *See* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Restraints*, 8 J. Legal Stud. 49, 94-98 (1979). The common law of nuisance thus secures the average reciprocity of advantage that has long been held to be the hallmark of a just legislative regime. *See Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

Rhode Island's regulatory scheme for wetlands offers no such protection. It is the product of factional legislative politics of the sort that the takings clause, like other constitutional provisions, guard against. The restrictions that these regulations impose on Petitioner are not designed to benefit his neighbors (who are similarly wiped out), but are consciously designed to provide benefits for the public at large. As such, these forms of wetlands regulations unquestionably meet any intelligible standard for public use, even under a neutral interpretive standard that does not give the state every benefit

of the doubt as does *Hawaiian Housing Authority v. Midkiff*, 467 U.S. 229 (1984). But the implication is clear: once it is decided that certain takings of private property have been for public use, the state is unambiguously required to make the payment of just compensation that is pointedly omitted here.

Nor is the Supreme Court of Rhode Island's decision justified under this Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). On its facts, that case is easily distinguishable because it did not involve a total prohibition against all beneficial use, which makes *Lucas* the closer precedent. But after wholly ignoring the different contexts, the Rhode Island Court treated *Penn Central* as if it barred Petitioner's claim by limiting the protection of the takings clause solely to "investment-backed expectations". In particular, *Palazzolo*, 746 A.2d at 717, n.9, explicitly rejected the proposition that "a party to whom property passes through operation of law could assume the investment-backed expectations of the original owner."

Palazzolo's logic is flawed on many grounds. First, its reading of *Penn Central* eviscerates the full holding of that case. *Penn Central* "identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, *relevant* considerations. So, too, is the character of the governmental action." *Penn Central*, 438 U.S. at 124 (emphasis added) (internal citations omitted).

Left to its own devices, the Rhode Island Court, without justification, elevated its own (misguided) interpretation of investment-backed expectations from relevant consideration to dispositive status. Yet nowhere did *Penn Central* so much as mention any rule that makes it impossible for the transferee to raise takings objections available to the transferor, even though that ostensible rule would have applied on *Penn Central*'s facts. In *Penn Central*, the City designated the Grand Central Terminal

as a landmark in *1967* while the lessee and co-plaintiff in the case, UGP, a British Corporation, had acquired its interest only in *1968*. *Penn Central*, 438 U.S. at 115-116. Yet UGP, the subsequent transferee, was rightly allowed to raise the same challenges against the regulation as *Penn Central*, thus avoiding the unnecessary inconsistent treatment of takings claims that the estoppel rule would require.

More generally, as noted in *Preseault*, 100 F.3d at 1540, "investment-backed expectations" has never been construed by this Court to eviscerate the constitutional protections for private property. That phrase, for example, has never been read to hold that a state may seize land from a *donee* without compensation because he made no investment in the property. Nor could the reference to investment-backed expectations make sense if every state announcement of future legislative intentions could shatter the expectations of property owners that they will be allowed to hold and transfer the ordinary rights to possess, use and dispose of property that have been part and parcel of all schemes of private property from Roman times forward. Rather, the right response is that this state claim of system-wide estoppel is invalid on its face, so that subsequent takers have every expectation of being able to stand in the shoes of their predecessors in raising challenges to state regulations.

C. Federal and State Courts Should No Longer Be Allowed to Depart from the Teachings of *Nollan* and *Lucas*.

The principles of *Nollan* and *Lucas* set a general constitutional framework for evaluating takings challenges by original owners and their subsequent transferees. Their principles apply across the board to both facial and as-applied challenges. They also apply to both cases of physical occupation (*Nollan*) or a regulatory taking (*Lucas*). Yet many federal circuits and the state courts have joined Rhode Island in departing from the teachings of both cases.

One judicial line of cases undermines these precedents by denying that the subsequent transferee even has *standing* to mount a takings challenge in the first place. In *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993), the Ninth Circuit denied takings and due process challenges to California's Mobile Home Residency Law, which prohibited park owners from increasing rents upon termination of a tenancy or sale of a mobile home. *See also Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994) (same). Any landlord who purchased his mobile home park after the passage of the Residency Law was forever barred. As the position was stated in *Carson Harbor*:

> Because Carson Harbor did not own the property when the statutes were enacted and when the alleged facial takings occurred, it has incurred no injury entitling it to assert a facial claim . . . . A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken. Carson Harbor has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property.

37 F.3d at 476.

Not so. As stated, this misguided rule would have quite literally forced tens or hundreds of landowners to bring suit instantly upon passage of the Residency Law to protect their rights. As such, *Levald* and *Carson Harbor* gratuitously invite a torrent of lawsuits long before any concrete dispute has arisen when it makes sense to allow the landowner the option to delay the facial challenge until some specific dispute arises. No discernible reason of public policy precludes the assignment of either facial or as-applied constitutional causes of action along with the property if the parties so desire. And there is no reason to depart from the default rule that presumes such

assignment in facial challenges. Certainly, Footnote 2 in *Nollan* draws no distinction between the two kinds of claims. This Court should reaffirm that position in the instant case.

In addition, some state courts have read *Lucas* to allow a state to treat its own regulations as a background condition even in the context of physical occupation by the state. Consider the plight of the plaintiff in *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997). His car wash was located on a plot of land abutting a public road. In 1978, the City published a map indicating that the street would have a new legal grade some four feet higher than its then-current actual grade. Some ten years later, plaintiff purchased the land with constructive notice of the map, and he was held estopped when the City's public construction project brought the street up to legal grade by placing side fill on top of about 2,400 square feet of his property to keep the road physically in place. The New York Court of Appeals held that Kim could not receive any compensation for this physical invasion because he purchased the land with constructive notice of the legal grade, by virtue of the common law *and* City Charter obligation of lateral support to a public roadway. It then concluded, with an erroneous reliance on *Lucas*, that plaintiff's title never encompassed the property interest that the claim had been taken. *See id.*

Yet, as the dissent perceptively pointed out, the reference to the common law obligations of lateral support were pure window-dressing, for they could *never* have justified *forcing* one person to accept side fill from another without his consent. Beyond doubt, the common law rules only required that a person not remove his own land in ways that withdraws support from his neighbor. *See Restatement (Second) of Torts* § 817; *Kim*, 681 N.E.2d at 324 (Smith, J., dissenting). In truth, the state's entire case turned on the utterly asymmetrical obligation that requires private individuals to accept side fill for public benefit, but which never would have tolerated so much as an inch of fill on public property to prop up any private

lands. The test of average reciprocity of advantage requires an *even* distribution of benefits and burdens between the affected parties. But that test is clearly flunked by a decision that imposes the full burdens of occupation on the private owner and gives the full benefits to the public at large.

The entire situation cries out for immediate redress, but note that the government taking goes utterly unchallenged on the view that Rhode Island takes here. For starters, the filling of plaintiff's land constitutes a per se taking under *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) ("a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve"). Yet it seems wholly impractical to put the plaintiff's predecessor in title to the cost of challenging a map designation when there is a high probability that the actual grade alteration may never be made. Nor can he be expected to maintain that challenge 10 years later just before he sells the property, or 12 years later when New York City commences its improvement of property now owned and occupied by plaintiff. The upshot of this case is clear: the constitutional obligation to compensate for physical occupation under *Loretto* has been effectively side-stepped by the simple maneuver of announcing in 1978 actions that were only undertaken in 1990. The incentive for the state to make broad announcements to defeat private rights is too painfully evident to require further elaboration. Any state could render that constitutional protection wholly nugatory within a generation by the simple expedient of enacting today a blanket rule that henceforth subjects any and all use of private property to the unfettered discretion of state officials.

Fortunately, not all state and lower federal courts have pursued this destructive legal course. In *Preseault*, 100 F.3d at 1525, Preseault's predecessor in title conveyed in 1899 to the Rutland-Canadian Railway right-of-way that allowed it to use the subject property for railroad purposes. The Railroad was to return the property to the

fee owner on the succession of that use. Thereafter, the Transportation Act of 1920, ch. 91, 41 Stat. 456 (1920), restricted the power of railroads to abandon their lines; and in 1976, Congress passed the Rail Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, 90 Stat. 31 (1976) (codified as amended in scattered sections of 45 U.S.C., 49 U.S.C., 15 U.S.C., and 31 U.S.C.), which authorized the use of abandoned railroad lines as bike trails for the public at large, without paying any compensation to the underlying holder of the fee interest. The United States had urged that the appropriate time to bring a takings claim was either in 1920 or 1976, and claimed that Preseault was accordingly barred from suing the United States for compensation when Vermont (pursuant to federal grant) built the bike path through the middle of his property and barred Preseault's access to it. The Federal Circuit thus refused to accept an argument that either the 1920 Transportation Act or the 4-R Act counted as a background condition under *Lucas*, noting that its background principles were "state-defined nuisance rules." *Preseault*, 100 F.3d at 1538. It further rejected the contention that the Preseaults had no reasonable expectations to recover their property because they "should have anticipated that at some time in the future the Government might exercise its general regulatory powers in a way that could frustrate the Preseault's interest in obtaining the land free of the easement upon its abandonment by the railroad." *Id.* at 1539.

Surely that decision is the soul of good sense. It makes no sense to require every landowner to sue upon the passage of a general regulatory scheme years before any actual conflict arises. Preseault deserved a fair shot at the government's action when the physical occupation took place, whether he was the original owner or a subsequent transferee. *Preseault* should govern here. The decision of the Rhode Island Court should be reversed on this point.

II. PALAZZOLO'S CLAIM IS RIPE FOR HEARING ON THE CURRENT RECORD.

As noted earlier, this Court's position in *Williamson* holds as a general proposition that an administrative agency must issue a final decision on the takings issue in order for the landowner to obtain review of that decision in state or federal court. In so holding, this Court's position is at sharp variance with its view that individuals who claim violation of their First Amendment rights are entitled to a prompt and effective judicial review. Under First Amendment law, any general licensing scheme is viewed under a presumption of distrust. The grounds for decision must be narrowly and clearly defined, and procedures at the very least must be introduced to allow for a prompt review of the administrative decision. *See, e.g., City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988) (striking down standard licensing ordinance for placement of newspaper vending racks on public streets); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (noting the need for "prompt final judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license."); *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

It is hornbook law that the strict scrutiny required under the First Amendment manifests a deep and deserved suspicion of government motives. For these purposes, it is only necessary to argue that some fraction of that healthy skepticism about government discretion should carry over to the takings area. All the signs of government abuse that are subject to powerful scrutiny under the First Amendment are present in abundance in the wide range of government initiatives that impact property rights, such as wetlands regulations, government actions under the Endangered Species Act, zoning statutes, eminent domain actions, and landmark preservation laws: broad discretion, standardless rules, endless procedural delays, evidentiary presumptions in favor of

state action all combine to often insulate takings challenges from judicial review in either federal or state court. This abuse was perfectly evident in the endless string of false administrative promises in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), that strung out over several years, as proposals to develop 344, then 264, then 224, and finally 190 units all were rejected for one reason or another over a period of over five years, before the first lawsuit was filed.

That strong whiff of administrative malfeasance is equally manifest in the instant case, given that the Petitioner had to wait 28 years to get his case to court and another 10 years to obtain an adverse trial ruling. But if the Supreme Court of Rhode Island is to be believed, the case has still not resulted in a controversy ripe for judicial review. Justice delayed, justice denied. In principle, the sting of these endless delays could be compensated for in money, which is one reason why takings cases do not present as compelling a case for immediate judicial intervention as First Amendment cases that strike down various licensing systems. But the landowner's interim losses are nonetheless irreversible unless state compensation is paid once the state action is found to constitute a regulatory taking.

In this case, Rhode Island seeks to extend the period of uncompensated interim loss by imposing a further condition that the Petitioner reapply for a grant, even after he has already reduced the number of acres that he wishes to develop. In so doing, it brings into view a qualification to the *First English* rule requiring compensation for interim takings: "We limit our holding to the facts presented, and of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us." *First English*, 482 U.S. at 321. Unfortunately, the basic rule of *First English* is frequently swallowed up by this

exception when administrative agencies expand the "normal delays" of permit process without any temporal limitation at all. Some effort should be made to redress this manifest imbalance.

In this case, the Petitioner only asks that this Court take a first modest step toward a restoration of that balance; he only asks for the right to *now lose* definitively before the administrative agency in order to clear the path to judicial review. He insists that he be taken at his word when he claims that any lesser use of the wetlands than that he now proposes will not result in some net benefit.

In assessing the reasonableness of that request, it is imperative to look at the possible errors both ways from a prompt and clear decision. One possibility is that the reviewing court will sustain the position of the administrative agency by denying that the regulations in question work a partial or total taking of the subject property. If so, the agency is put to some additional expense. But these are hardly large on net, for the judicial hearing has likewise permitted it to economize on additional expenses that would otherwise take place for the further gear-grinding within the regulatory process. In addition, if the agency achieves a judicial victory then it may obtain some protection under the doctrine of *res judicata*, or, at the very least, gain the opportunity to further prolong the administrative process. Wholly apart from any ripeness prohibition, an aggrieved landowner has strong incentives not to bring rash actions that are likely to result in an adverse decision.

The costs to the landowner, however, are quite high if the administrative agency has issued an incorrect denial. Here the gist of Petitioner's claim is that any coherent development of his land requires adding fill to the entire wetland portion of his plot. If this Court requires that he put forward some "less grandiose plan," then he will *never* be able to obtain any clear judicial determination that addresses the question of whether his demand is right or wrong. At this point, the landowner runs the risk

of *obtaining* approval of a less ambitious plan. That "victory" will then give him the right to construct a project that will enable him to lose more money than he already has. But it will not give him the right to obtain a judicial decision on the merits of what he claims is his bare minimum proposal. In *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), this Court rebuffed a planning agency's effort to extend *Williamson* by holding that a planning denial for new construction was final even though the agency held out the possibility that the landowner in time could receive just compensation by assembling enough transferable development rights to build somewhere else at some indefinite future time. *Suitum* helps point the way here. In its simplest terms, the convoluted logic of the Supreme Court of Rhode Island implicates not only the substantive concerns raised under the takings clause, but also the elementary requirements for procedural due process binding on the states under the Fourteenth Amendment.

The Rhode Island Court sought to justify its continued evasion of its judicial obligations by insisting that "this [Rhode Island] Court will not render advisory opinions or function in the abstract." *Palazzolo*, 746 A.2d at 713; *see also Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49 (1967). But this is no abstract dispute when the Petitioner wishes to fill in a wetland that Rhode Island wishes to keep in its natural state. It is already quite clear that Petitioner has alleged that *any* acceptable program must allow him to fill in at the very least that portion of the wetland designated in his proposal, so the case is ripe no matter what plan is ultimately implemented. *Accord Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1576 (11th Cir. 1989); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999).

To be sure, once Petitioner obtains his initial fill permit, then subsequent supervision is necessary to make sure that any site development will not result in discharge that harms either public waters or wetlands

owned by neighbors. But current law, virtually everywhere, already requires that any landowner receive myriad permits before he pours the first ounce of dirt on any wetlands site. It cannot be the law that a landowner has to simultaneously put in requests for all the permits needed for fill before he is allowed to challenge the threshold determination of the overall regulatory scheme.

And that challenge is all the more appropriate when it appears that the CRMC will deny any and all proposals for development as a matter of course by announcing by regulation that it is only prepared to issue a special fill permit if Petitioner's "proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests." *See* Coastal Resource Management Program § 130(A). The construction of any number of private homes or of a beach club do not meet this standard, which in any event is suspect after *Lucas* for failing to distinguish restrictions that seek to create benefits for the public at large (for which compensation is required) and those which prevent the creation of nuisance, which have yet to be implicated at this stage of argument. The ripeness requirement performs a useful function in forcing the parties to join issues before there is any expenditure of judicial resources. But that requirement should not be converted to the ignoble end of making sure that an aggrieved landowner never receives his day in court.

III. THE SUPREME COURT OF RHODE ISLAND HAS EVISCERATED THE CONSTITUTIONAL REQUIREMENT OF JUST COMPENSATION FOR REGULATORY TAKINGS THAT DEPRIVE LANDOWNERS OF ALL BENEFICIAL ECONOMIC USE.

The third roadblock that the Rhode Island Court has thrown in the path of Petitioner's claim for compensation stems from its interpretation of the just compensation requirement in the event that the regulations in question, as is clearly the case here, deprive the landowner of all

beneficial use. As a matter of general theory, this Court has already held that the loss of all such beneficial use amounts to a taking of the land in question. That equivalence was highlighted in *Lucas* proper when the trial judge ordered Lucas to provide a fee simple deed to the state once it found that he had been deprived of all economic value. The same remedy could clearly be imposed in this case, and once a deed memorializes the transaction, then it becomes evident that the *only* acceptable level of compensation is the fair market value of the property taken prior to imposition of the wetlands restrictions condemnation. *See, e.g., Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

Yet in this case, the state seeks to wiggle out from this requirement by pointing to two related factors. First, that Petitioner could have made an open-space gift of the wetlands that would "have value in the amount of $157,000," presumably as a charitable deduction from both federal and state income taxes. *Palazzolo*, 746 A.2d at 715. In the next breath, however, the Rhode Island Court concedes that this amount is far less than "the speculative $3,150,000 profit that Palazzolo alleged he could earn from filling and developing the wetlands." *Id.* The adjective "speculative" does nothing, however, to avoid the serious conceptual issue here, for even if the rock-bottom fair market value for the unregulated land were, say, $1,000,000, the question remains why Palazzolo is not entitled to receive that amount in compensation for his loss.

It is instructive to note that Lucas could have also made an open-space gift of his beachfront property, and yet that point was never advanced as a reason to deny him full market value of the land once the total restriction on development was imposed. One obvious reason why these open-space gift values have never been taken into account is that *Lucas* requires compensation when the land has been deprived of all beneficial *use*. To speak of a use presupposes that the landowner remains in possession of the land, which cannot be done if the property is

given away. The larger issue in this case does not depend ultimately, however, on how narrowly or broadly the word "use" is construed. It depends on the larger structure and functions of the just compensation language found in the takings clause. The central problem with the State's position is that it guts the operation of the takings clause for all takings, both regulatory and possessory. In each and every case the state can avoid its obligation to pay just compensation by the simple expedient of announcing that it will accept an open-space gift of the property, or by finding some private conservation organization with tax-exempt status that can so receive the property. At this point, the state never has to face the hard question of whether it thinks the property in public hands is worth as much to the state as it was to the private owner. It becomes all too easy to force the open-space "gift" via a threat of condemnation on property that is worth millions for development – development that benefits real people – and thousands in private hands. The Constitution does not state, "Nor shall private property be taken for public use without a tax deduction equal to a small fraction of its overall value." Yet that is exactly how it has been construed by the Rhode Island Court.

The second argument advanced to justify the total wipe-out imposed by the CRMC refers back to the famous "denominator problem" that has troubled this Court in both *Penn Central* and *Lucas*. *See Penn Central*, 438 U.S. at 130-31; *Lucas*, 505 U.S. 1016, n.7; *see also Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Palm Beach Isles Associates*, 208 F.3d at 1380; *Loveladies Harbor Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Florida Rock Indus. Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994); Jan G. Laitos, *Law of Property Rights Protection: Limitations on Governmental Powers* § 11.08 (1998).

The root of the problem is conceptual, and not easily avoided or resolved under current law. A consistent and straightforward version of the takings clause would begin

by triggering the amount of the compensation owing in both regulatory and possessory takings, to the diminution in fair market value of the land attributable to the loss of any stick contained in the bundle of rights. If the state decided to take 10 acres from a 50 acre plot, then presumptively the compensation owing would equal 20 percent of the overall value. Subsequent adjustments in the payments could then be made if the severance of a unified parcel increased or decreased the value of the 40 acres that remained in private hands. In effect, the state would not have the proper incentives on the decision of whether or not to take, and it would receive credit for the positive spillovers that the takings created for the retained land (e.g. access to a public road), and it would have to pay additional compensation for any negative spillovers of its action (e.g. the inability to make efficient use of the smaller parcel).

In principle, regulatory takings could – and should – be governed by the same principles. *See* Richard A. Epstein, *Takings: Private Property and the Power of Eminent Domain*, 93-125, 195-215 (1985). The first step of the inquiry would ask solely the question of whether the government took by regulation some portion of the customary bundle of rights associated with ownership – including the rights of use and disposition necessarily involved with regulatory takings. The reduction in value from that government action thus represents the first approximation of the amount of money owed by way of just compensation. Next, just as in *Lucas*, the question is whether the government could justify all or part of those restrictions by showing that these were necessary to prevent the occurrence of a common law nuisance, as that expression has been traditionally understood. To the extent that the regulation in question counteracts a nuisance, the loss in question is not compensable to the owner, even if it should turn out to be total. Finally, it is critical to ask whether the regulation in question sweeps more broadly than the single owner who receives some implicit in-kind compensation from the imposition of like

restrictions on the parcels owned by neighbors. Any such compensation should be credited against the amounts owed by the government. That credit is more likely to be relevant in regulatory takings cases (which are not directed toward single parcels) than in physical takings cases. Nonetheless it cannot be presumed, because comprehensive regulation (as of the rebuilding of beachfront property in *Lucas*) could work to the uniform detriment of all the regulated parties. And at the end of the day, therefore, what is ultimately compensated is the *net* loss in value attributable to regulation that is not justified in the name of nuisance prevention.

In effect, the only way to bring overall coherence to the law of takings is to recognize that the *Lucas* framework cannot be artificially truncated with total takings, when its logic rightly extends to all forms of partial regulatory takings brought about by government action. There is no magic point at which the constitutional world flips over, such that regulations that require the loss of 99 percent of value *always* generate zero by way of compensation, while losses of 100 percent of value generate full compensation unless the state can offer an antinuisance justification for its action. The single thread that links all the cases together is this proposition: *the greater the legal restrictions on the traditional common law bundle of ownership rights, then the more the state has to pay.*

That one rule eliminates the conceptual conundrums under current takings law. The so-called denominator problem disappears because it no longer matters whether the owner has lost all of a small parcel or some of a larger parcel. No matter which characterization is used, the compensation is measured by net loss in economic value subject to the nuisance defenses. Unfortunately, however, under *Lucas*, the definition of "the" property matters in regulatory (but not possessory) takings, the requirement of compensation only kicks in once the landowner has been deprived of *all* beneficial economic use of the property. But no one has developed a coherent account of what that property might be. *See Laitos, supra,* at § 11.08.

Thus if the air rights were considered separately in *Penn Central,* then the restriction against further building would be fully compensated. But if they are treated as part of a single unit that contained the terminal on the location, then some beneficial use remains and no compensation is owing. Likewise, if the value of the underground coal in *DeBenedictis* is treated separately, then full compensation for the lost mineral rights is owing. But if it is treated as part of the fee, then it is not.

Within the confines of *Lucas* and *Penn Central,* the general approach of this Court has been to treat all limited interests in some designated parcel of land as part of the property, so long as it is owned by a single party at the onset of regulation. *See Penn Central,* 438 U.S. at 130-31. That approach, however, makes it difficult to deal with cases in which the mineral rights or the air rights had been severed from the fee simple long before the imposition of the state regulation. The individual owner *is* fully wiped out, but receives nothing in compensation. Worse still, this test has generated endless difficulties when the issue is how it applies to contiguous parcels of land that fall under common ownership. In some cases, the parcels are acquired at one time; but on other occasions they are acquired in separate transactions. In some cases, the parcels are subject to the same zoning restrictions; but in other cases they are not. In some cases title is taken by the same legal entity; but in other cases, different parcels may, for example, be acquired by different corporate entities that have overlapping shareholder interests. In these cases, the willingness to treat each parcel separately increases, *see Palm Beach Isles,* 208 F.3d at 1381, especially where some portion of the land has been sold off long before the state has adopted its current regulatory framework.

By that standard, the pre-1978 sale of the upland parcel does not seem to have any effect on the outcome, since the title to that plot of land appears to be separately held, and its use was not regulated by the wetland statutes. It appears therefore that under current law, such as

it is, the Petitioner is entitled to treat his wetland holdings as "the" property without regard to any uplands interest that he previously sold off. To hold otherwise is to penalize retroactively thousands of landowners who entered into perfectly normal commercial transactions without any knowledge that subsequent articulation of takings law renders them defenseless against any and all land use regulations. And its implications are, frankly, frightening for the law of possessory takings by raising the possibility that the state could confiscate all the Petitioner's current land because he had the misfortune to sell off one fraction of it. The dangers of this system can only be avoided by taking the consistent position that the more the state takes by regulation, the more it must pay. But its inconveniences can be obviated by a simple approach that treats parcels as separate when they have been separately acquired unless their owner unites them into a single parcel. In this case, no such unification has taken place, so that the judgment of the Supreme Court of Rhode Island should be reversed on this point.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court of Rhode Island should be reversed.

Respectfully submitted,

RICHARD A. EPSTEIN
1111 East 60th Street
Chicago, IL 60637
(773) 702-9494

INSTITUTE FOR JUSTICE
*WILLIAM H. MELLOR
CLINT BOLICK
SCOTT G. BULLOCK
Suite 200
1717 Pennsylvania Ave., NW
Washington, DC 20006
(202) 955-1300

Counsel of Record

(8)

NOV 22 2000

No. 99-2047

SUPREME COURT, U.S.
FILED
NOV 22 2000
CLERK

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TRAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE CALIFORNIA COASTAL PROPERTY OWNERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MARK E. HADDAD
CATHERINE VALERIO BARRAD
RONALD L. STEINER
SIDLEY & AUSTIN
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

CARTER G. PHILLIPS*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amicus Curiae

November 22, 2000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

57 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 6

I. A PROPERTY OWNER MAY BRING A TAKINGS CHALLENGE TO GOVERNMENTAL ACTION THAT PREDATES THE OWNER'S ACQUISITION OF THE PROPERTY 6

A. *Nollan* Held That Owners May Challenge Physical Takings That Predate Their Purchase. 7

B. *Lucas* Did Not Change The Standing Of Subsequent Owners 11

II. THE CALIFORNIA COASTAL COMMISSION'S CONTINUING EFFORTS TO DENY STANDING TO SUBSEQUENT OWNERS ILLUSTRATES THE BROAD IMPORTANCE OF THE FIRST QUESTION PRESENTED 15

A. Pending California Litigation 15

B. The California Coastal Commission's Policies Are Rendering *Nollan* A Nullity 20

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Armstrong v. *United States*, 364 U.S. 40 (1960).... 21
Barrows v. *Jackson*, 346 U.S. 249 (1953) 10
Cole v. *Board of Supervisors*, No. 01003407 (Santa Barbara Cal. Super. Ct. Nov. 21, 2000)... 18
Corpus v. *Estelle*, 414 U.S. 932 (1973)..... 21
Daniel v. *County of Santa Barbara*, No. 99-56887 (9th Cir., filed December 16, 1999)..... 15
Dolan v. *City of Tigard*, 512 U.S. 374 (1994) 9
Kaiser Aetna v. *United States*, 444 U.S. 161 (1979) 12, 20
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).....*passim*
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987).....*passim*
Parker v. *California Coastal Comm'n*, No. 305674 (San Francisco Cal. Super. Ct. Dec. 21, 1999)..... 18
Scranton v. *Wheeler*, 179 U.S. 141 (1900)..... 12
Stevens v. *City of Cannon Beach*, 510 U.S. 1207 (1994) 14
Webbs' Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980)..... 14

STATUTE

Cal. Pub. Res. Code § 30212..... 19

RULE

Sup. Ct. R. 37.6 1

OTHER AUTHORITIES

California Ass'n of Realtors, *House Finance Survey* (1999) 20

TABLE OF AUTHORITIES

Page

California Coastal Comm'n, *Public Access Action Plan* (June 1999), *available at* http://www.coastal.ca.gov/access/accesspl.pdf..... 19
Inman News Features, *Home Switchers Accelerate* (Nov. 19, 1998), *available at* http://news.inman.com/inmanstories.asp?ID=11469 20

IN THE

Supreme Court of the United States

No. 99-2047

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TRAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE CALIFORNIA COASTAL PROPERTY OWNERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus California Coastal Property Owners Association ("Association") is an association of owners of property located within the highly regulated California coastal zone. The Association was formed in response to the California Coastal Commission's failure to implement and abide by this

[1] Pursuant to Rule 37.6 of this Court, *amicus* states that no party had any role in writing this brief, and that no one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. This brief is being filed in accordance with the consent of the parties; their letter of consent has been filed with the Clerk.

Court's decision in *Nollan* v. *California Coastal Commission* and by the terms of the Commission's statutory charter. The Association's principal purpose is to advocate for and to help ensure that the regulation of private property, development, and public beach access along the coast of California is consistent with state and federal law and the Constitution of the United States, and that it reflects an appropriate balance between the interests of the public in coastal access and preservation and the constitutional rights of coastal property owners to the full enjoyment and use of their property.

The Association will address the first question presented by the petition – whether property owners lack standing to bring takings challenges to government action that predates the acquisition of their property. This is a question of enormous importance. It is vital not only to disputes involving the particular type of regulatory taking at issue here (an ordinance that is alleged to deny the owner all economically beneficial use of his property), but also to all regulatory takings claims, including those, as in *Nollan*, that involve a physical invasion of property.

In particular, this issue is at the heart of a number of pending disputes involving coastal property in California. Despite this Court's seemingly unequivocal holdings in *Nollan*, *Dolan*, and *Lucas*, courts and public agencies, including the California Coastal Commission, are currently using the same arguments adopted by the Rhode Island Supreme Court to bar property owners from challenging *Nollan*-like physical takings because they did not own the property at the time the unconstitutional permit condition was imposed. Thus, the Association has a significant interest in the first issue presented in this case.

The Association takes no position on the remaining questions presented, or on the ultimate merits of this dispute. As property owners who enjoy and whose property benefits from the preservation of the unique environment of the coastal zone, the Association's members fully appreciate the

need to weigh carefully the impact of any proposal to alter the often-fragile ecological balance in that zone. We acknowledge that state and local governments have good reason to be concerned and cautious regarding proposals for coastal development, and certainly that includes any proposal that might alter or destroy wetlands. Nevertheless, the Association also believes that even the most important environmental objectives must be pursued consistent with the dictates of the United States Constitution, and that this Court's prior decisions in *Nollan* and *Lucas* have already established the bounds within which governments constitutionally may act. Foreclosing property owners from even bringing their takings challenges to court, as Rhode Island has done, and as the California Coastal Commission is seeking to do, falls well outside these constitutional limits.

SUMMARY OF ARGUMENT

The threshold issue in this case is whether a property owner is barred forever from challenging government action as a taking because that action occurred prior to the owner's acquisition of the property. The question arises here in the context of one type of per se "regulatory taking," involving a governmental action that deprives the owner of all beneficial economic use of the property. But the decision below would apply equally to the other type of per se regulatory taking, called a "physical taking" below, when the government takes steps physically to occupy the property, such as by taking a permanent easement. The Rhode Island Supreme Court made clear its view that the same rule should apply to both types of takings. Indeed, in justifying its holding with respect to the former category of regulatory takings, the Rhode Island Supreme Court expressly and heavily relied on what it considered the settled ban on subsequent owner standing to challenge physical takings. See Pet. App. A-16.

The Rhode Island Supreme Court erred in its analysis of both types of regulatory takings claims. Although the law

with respect to subsequent purchasers is settled with respect to physical takings, the rule in fact is precisely the opposite of the rule stated below. In *Nollan* v. *California Coastal Commission*, this Court squarely held that a subsequent purchaser has standing to challenge a physical taking. 483 U.S. 825, 834 n.2 (1987). Although the Court's discussion of this point appeared in a footnote, the issue itself was heavily briefed, its resolution was unambiguous, and it was necessary to the result. The holding in *Nollan* therefore cannot be dismissed as mere dictum.

Given this clear holding, it would have been shocking if the Court's decision in *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), on which the court below also relied heavily, had altered the law. It did not. Contrary to the Rhode Island Supreme Court's misreading, *Lucas* did not establish a new rule that all state laws or policies that are in effect as of the time property is acquired automatically become part of the limited set of "background principles" of state law that are immune from challenge under the Takings Clause. The Court instead took pains in *Lucas* to make clear that only those state laws that "do no more than duplicate the result that could have been achieved in the courts" were they to have applied longstanding state law with respect to "public nuisance," "private nuisance," and the "forestalling of grave threats to the lives and property of others" (*id.* at 1029 & n.16), are not subject to a takings claim. And the Court further made clear its intent – in clarifying the law with respect to regulatory takings that deny all beneficial economic use – to adopt a rule that provides such claims "similar treatment" to that provided to physical takings. *Id.* There is thus no basis for the rule against standing for subsequent owners that Rhode Island enforced here.

The Court's decision on the significance of the timing of ownership will have an enormous impact not simply upon the loss-of-all-economic use claim at issue here, but upon all per se regulatory takings claims, including those involving the

physical invasion of private property. As the Court observed in *Lucas*, it is appropriate to afford "similar treatment" to both types of claims. *Id.* at 1029. This Court's decision therefore can, and should, clarify that its holding is applicable to both types of per se regulatory takings claims.

Such clarity is particularly important because the Court's mandate in *Nollan* and other physical takings cases is being denied by lower courts and by state and local government agencies on the same theory adopted by the Rhode Island Supreme Court. Most notably, the California Coastal Commission itself is now using *Lucas* as an excuse to revive arguments that it advanced – and that this Court rejected – in the *Nollan* case. As a result, state and federal courts have barred property owners from challenging the very same types of takings of beachfront easements that this Court condemned as "'out and out extortion'" over 13 years ago. It is inconceivable that such blatant misappropriations of private property could ever be reconciled with the "background principles" of state common law that the Court identified in *Lucas* as limiting the government's ability to take property without compensation. The Commission's actions thus confirm what several members of this Court have acknowledged, which is that such a misreading of *Lucas* would render this Court's takings jurisprudence a nullity.

Given this alarming pattern of lower court misapprehension and state agency defiance of *Nollan* and *Lucas*, it is vitally important for this Court to address the standing of subsequent owners in both the physical and regulatory takings contexts. The Court should make clear, as a general rule, that subsequent owners have the same rights as prior owners to challenge unlawful government takings of private property.

ARGUMENT

I. A PROPERTY OWNER MAY BRING A TAKINGS CHALLENGE TO GOVERNMENTAL ACTION THAT PREDATES THE OWNER'S ACQUISITION OF THE PROPERTY.

This Court has identified "at least two discrete categories of regulatory action" that effect a per se taking of private property. *Lucas*, 505 U.S. at 1015. One category, alleged by petitioner in this case, is "where regulation denies all economically beneficial or productive use of [the] land." *Id.* The other, (alleged, for example in *Nollan*), "encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* As "per se" takings, each of these types of actions requires the payment of compensation "without case-specific inquiry into the public interest advanced in support of the restraint." *Id.*

The Rhode Island Supreme Court correctly recited this Court's typology of takings claims, though it chose to call the former type a "regulatory taking" and the latter a "physical taking." Pet. App. A-8 to A-9. And it accurately observed that it would be inconsistent with *Lucas* if "regulatory takings would be treated differently from physical takings," because in *Lucas* the Court stated that "the two types of takings should be accorded similar treatment." *Id.* at A-16. But the Rhode Island Supreme Court gravely erred when it concluded, based on *Lucas*, that "[a]ll subsequent owners take the land subject to the pre-existing limitations and without the compensation owed to the original affected owner." *Id.*

The Rhode Island Supreme Court began by deriving from *Lucas* the proposition that *any* state law or regulation that "predates the claimant's ownership of the land" limits his title and therefore forecloses his standing to assert a takings challenge. Pet. App. A-15. This was error, for the court below examined none of the limiting factors that this Court set forth for determining whether a given law could properly

be found to be part of the "background principles of the State's law of property and nuisance," which in turn determines whether what was taken by that law was part of the owner's title to begin with. *Lucas*, 505 U.S. at 1029-31.

The court then compounded the error by asserting that when a "physical taking" is at issue, "only the owner at the time of the taking is owed compensation." Pet. App. A-16. This Court's decision in *Nollan* establishes that subsequent owners may challenge per se takings which "predate" their acquisition of their property and of which they had full notice at the time of the acquisition. Nothing in *Lucas* disturbed this holding, either for physical takings cases, or for cases where the government action deprived the owner of all economically beneficial or productive use of the property.

A. *Nollan* Held That Owners May Challenge Physical Takings That Predate Their Purchase.

This Court addressed, and rejected, the argument that property owners are barrred from challenging physical takings that predate their acquisition of the property in *Nollan v. California Coastal Commission*. As the Court acknowledged, the Nollans did not actually purchase their property until *after* the Coastal Commission had imposed the permit condition at issue, and thus they had knowledge of both the specific permit condition and the Commission's longstanding policy of imposing such conditions at the time they purchased their property. *Nollan*, 483 U.S. at 828-30.[2] The California Coastal Commission and numerous *amici* urged the Court to

---

[2] *See also Nollan*, 483 U.S. at 860 (Brennan, J., dissenting); Brief of Appellee California Coastal Commission at 30, 34, *Nollan, supra*, (No. 86-133) ("Commission Br."); Brief of *Amicus Curiae* Natural Resources Defense Council at 27 n.21, *Nollan, supra*, (No. 86-133) ("NRDC Br."); Brief of *Amicus Curiae* Designated California Cities and Counties at 8, *Nollan, supra*, (No. 86-133) ("Cities and Counties Br."); Brief of *Amicus Curiae* the Commonwealth of Massachusetts at 14, *Nollan, supra*, (No. 86-133) ("State AGs Br.").

reject the Nollans' challenge on this basis alone. See pages 9-10, *infra*.

The Court flatly rejected that argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 834 n.2.

This aspect of the *Nollan* decision was not dicta, but was necessary to the Court's holding. At issue in *Nollan* was a longstanding "comprehensive program" of the California Coastal Commission to require all coastal property owners to record an offer to dedicate a public easement across their property in return for approval of any development permit they might submit. See *Nollan*, 483 U.S. at 827-29, 831, 841. The condition demanded of the Nollans was to offer to dedicate a lateral public easement across their beachfront in exchange for permission to replace a small, dilapidated summer rental cottage with a larger, three-bedroom, permanent residence. *Id.* at 828. The easement, which would have allowed the public to pass and repass between two public beaches along the coast above and below the tract, was defended by the Commission as necessary to offset the impact on public beach access from the "blockage of the view of the ocean" caused by the new, larger structure. *Id.*

The Court acknowledged that the Commission has a legitimate public interest in ensuring visual access to the ocean, and observed that the Commission could have sought to protect that interest by requiring the property owners to offer to dedicate "a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere." *Id.* at 836. But the Court rejected this

justification with respect to the condition imposed on the Nollans, because there was no "nexus" between "visual access to the ocean and a permit condition requiring lateral public access along the Nollans' beachfront lot." *Dolan* v. *City of Tigard*, 512 U.S. 374, 387 (1994). "The absence of a nexus left the Commission in the position of simply trying to obtain an easement through gimmickry," *Id.* at 387, converting the policy of imposing such permit conditions without proof of a valid nexus into "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837 (citation omitted). Thus, the central holding of *Nollan* is that, to avoid paying compensation for the taking of an easement, the government must prove a nexus between the impact of the permit condition and the purpose "advanced as the justification" for it. *Id.*[3]

The Court could not have reached this holding, however, if the Nollans had lacked standing to bring their takings challenge in the first place. And the argument that the Nollans lacked standing because they had notice of the Commission's comprehensive program of exacting public easements, and bought their property subject to that restriction, was raised both by the Coastal Commission itself and by numerous *amici curiae*.

The Commission, for example, pointed out that the Nollans "did not exercise their option to *purchase* the lot until *after* the Commission's decision" to impose the challenged condition on their development permit. Commission Br., at 34 (emphasis supplied). The Commission claimed that this fact alone was dispositive: "[t]he timing of the Nollans' purchase

---

[3] The Court in *Nollan* held that the burden of proof rested with the Government, *Nollan*, 483 U.S. at 836, and subsequently held in *Dolan* v. *City of Tigard* that the government also bears the burden of showing that the impact of the condition on the property owner is roughly proportional to the degree to which the condition advances the governmental objective. 512 U.S. at 391 n.8, 395.

alone is sufficient to defeat a taking." *Id.* The Commission further buttressed the point by arguing that the Nollans had "no expectation of continued private use" that was frustrated by the government. *Id.* at 30. "Quite the contrary," the Commission asserted:

> [T]he Nollans were fully informed of the Commission's obligation to require them to permit public use of their beachfront as a condition of development approval *long before they purchased their lot* and built their new house. Striking the access condition now would result in an absolute windfall to the Nollans and a detriment to the public.[4]

Id. (emphasis supplied).

Several *amici curiae* made this same point to the Court. See, *e.g.*, NRDC Br., at 22-23 n.16 (Nollans knew of condition of public access over their beach "through [the Commission's] imposition of conditions on their development permit *before* they ever exercised their option to purchase the property") (emphasis in original).[5] And several dissenting Justices maintained that the notice that the Nollans had of the state's intent to demand an easement in return for any coastal development should have defeated their takings claim. *Nollan*, 483 U.S. at 860 (Brennan, J., joined by Marshall, J., dissenting) (appellants were "on notice that new developments would be approved only if provisions were made for lateral beach access"); *id.* at 866 (Blackmun, J., dissenting)

---

[4] The Court's decision to allow the Nollans to obtain the "windfall" of building their house without having to relinquish an easement echoes the Court's decision to let those homeowners who first sold to non-white purchasers in violation of racial covenants keep the financial "windfall" they allegedly received. *See Barrows* v. *Jackson*, 346 U.S. 249 (1953); *see also id.* at 268 (Vinson, C.J. dissenting) (Court should have allowed state to compel homeowners to "disgorge that which was gained at the expense of depreciation in her neighbors' property").

[5] *See also* State AGs Br., at 14; Cities and Counties Br., at 8 n.3.

("Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.").

Thus, in *Nollan*, the Court was presented, in the context of a physical taking, with the same arguments for denying standing to a subsequent owner that the Rhode Island Supreme Court found convincing in *Palazzolo*. The Court squarely rejected these arguments in *Nollan*. The only remaining question, therefore, is whether *Lucas* changed this law.

B. *Lucas* Did Not Change The Standing Of Subsequent Owners.

In *Lucas* v. *South Carolina Coastal Council*, this Court reversed the state court's judgment that a statute banning all residential construction on petitioner's beachfront property had not caused a taking, and remanded for an evaluation whether that statute merely implemented a result that could otherwise have been obtained through application of the state's existing background law of nuisance and property. 505 U.S. at 1031-32. Because the statute at issue was passed *after* Lucas acquired his property, the question presented here in *Palazzolo* was plainly not presented in *Lucas*. And nowhere did the Court suggest in *Lucas* that it was intending to reverse or even to narrow its prior holding in *Nollan*. Under traditional principles of jurisprudence, then, *Lucas* did not cut back on *Nollan*. Nevertheless, the Rhode Island Supreme Court relied on certain statements in *Lucas* to justify its holding that property owners are categorically barred from bringing takings challenges to governmental action that predates their ownership of the property.

The Rhode Island Supreme Court referred first to what it called "the Supreme Court's dictate in *Lucas* instructing reviewing courts to determine whether a landowner originally possessed the right to engage in a particular use." Pet. App. A-15. It then cited to the "similar treatment" that the Court said in *Lucas* should be afforded to regulatory and physical

takings, and quoted an example from *Lucas* that "'a permanent easement that was a pre-existing limitation upon the landowner's title' would not amount to a compensable taking." *Id.* at A-16 (quoting *Lucas*, 505 U.S. at 1028-29). The lower court then assumed, without further reference to *Lucas*, that *any* pre-existing statutory or regulatory limitation on the owner's title was sufficient to bar a challenge to that limitation. *Id.*

But that is clearly not what *Lucas* held. In the passage immediately following the example relied on below of the "permanent easement that was a pre-existing limitation upon the landowner's title," the Court went on to explain the point, first, by contrasting two cases. In one case, *Scranton* v. *Wheeler*, 179 U.S. 141 (1900), the Court found that no taking had occurred, because the interests of a "riparian owner in the submerged lands . . . bordering on a public navigable water" were held subject to the government's navigational servitude. *Id.* at 163. The government's navigational servitude is an inherent limitation on submerged land that borders a public navigable water, and so any purchaser of such land takes title subject to it, and cannot claim a taking when the government exercises its rights. *Id.* at 162. By contrast, in *Kaiser Aetna* v. *United States*, 444 U.S. 161, 178-80 (1979), the navigational servitude was held *not* to be part of the background law that limited the owner's title to the property in question. That property was originally "separated from the adjacent bay and ocean by a natural barrier beach, [and it] has always been considered to be private property under Hawaiian law." *Id.* at 178-79. These cases thus illustrate the narrow scope this Court has given to government assertions of a "permanent easement that was a pre-existing limitation upon the landowner's title."

After contrasting these two physical takings cases, the Court stated that "similar treatment" was appropriate for regulatory takings, and further explained that only a very limited range of statutes would not be subject to per se

condemnation were they to prohibit all beneficial use of land. The range was limited to those laws that "do no more than duplicate the result that could have been achieved in the courts—by adjacent landowners (or other uniquely affected persons) under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally, or otherwise," such as "forestalling 'grave threats to the lives and property of others.' " *Lucas*, 505 U.S. at 1029 & n.16. Like the navigational servitude, these sorts of limitations on private property, the Court explained, "*inhere in the title itself*, in the restrictions that background principles of the State's law of *property* and *nuisance* already place upon land ownership." *Id.* at 1029 (emphasis supplied). Thus, a per se takings claim could not succeed against a statute that did nothing more than codify these principles, for in so doing the state would simply "make the implication of those background principles of nuisance and property law explicit." *Id.* at 1030. Conversely, the Court made clear, statutes that went beyond these principles would work a taking. *Id.* at 1031-32.

By relying selectively on only snippets of language from *Lucas*, then, the lower court missed its central point. Only a very narrow class of statutes is immune from challenge under the Takings Clause – those that "duplicate" what the courts could achieve under background principles of nuisance and property law. Nothing in *Lucas* cuts back on the standing, expressly vindicated in *Nollan*, of owners to challenge "extortionate" permit conditions imposed before they acquired title, or to challenge pre-existing laws that deprive new owners of all beneficial use of their property, simply because a prior owner failed to challenge those unconstitutional actions. Rather, as in *Nollan*, those "prior owners must be understood to have transferred their full property rights in conveying the lot" – including the right to challenge any prior government action amounting to a taking. *Nollan*, 483 U.S. at 834 n.2.

Since *Lucas* was decided, two justices have observed that its meaning would be rendered a "nullity" if property rights could be eliminated by "pretextual procedural rulings" or any other law that a state simply chose, without foundation, to denominate as "background law." Thus, Justice Scalia, joined by Justice O'Connor, stated:

> [a]s a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through *pretextual procedural rulings*, neither may it do so by invoking *nonexistent rules of state substantive law*. Our opinion in *Lucas*, for example, would be a *nullity* if *anything* that a state court chooses to denominate "background law" – regardless of whether it is really such – could eliminate property rights. . . . No more by judicial decree than by legislative fiat may a State transform private property into public property without compensation.

Stevens v. *City of Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., joined by O'Connor, J., dissenting from denial of petition for writ of certiorari) (emphasis supplied) (citations omitted).

Justice Kennedy made a similar point when he observed, in separate writing in *Lucas*, that the Constitution protects those investment-backed expectations that "are based on objective rules and customs that can be understood as reasonable by all parties involved," and are not automatically limited by anything the "courts allow as a proper exercise of governmental authority," for in that event property would merely "become what courts say it is." *Lucas*, 505 U.S. at 1034-35 (Kennedy, J., concurring in the judgment). Indeed, it is fundamental to takings law that "a State, by *ipse dixit*, may not transform private property into public property without compensation . . . ." *Webbs' Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980). Thus, to interpret *Lucas* to permit states to enforce procedural bars to challenges to

government action that plainly worked a taking at the time it occurred, and that continues to cloud the current owner's title, is improper, for it would render the constitutional protection that *Lucas* sought to extend a "nullity." Whatever laws might be invoked to justify such a procedural bar, they are not a part of the limited range of "background principles of nuisance and property law" that the Court described in *Lucas*. They would also conflict directly with applicable law in the context of physical takings, which – per *Nollan* – allows such challenges to be brought.

II. THE CALIFORNIA COASTAL COMMISSION'S CONTINUING EFFORTS TO DENY STANDING TO SUBSEQUENT OWNERS ILLUSTRATES THE BROAD IMPORTANCE OF THE FIRST QUESTION PRESENTED.

Whether subsequent purchasers should be categorically barred from challenging an unconstitutional taking of property is a critical issue in several pending proceedings in California. The California Coastal Commission, the state Attorney General, and one local government have each taken the position that subsequent owners do not have standing to challenge the taking of easements if the permit condition was imposed prior to their acquisition of the property. Astonishingly, they take that position despite the fact that this Court rejected this argument in the *Nollan* litigation to which the California Coastal Commission was itself a party. And to date, the argument has been accepted by one federal district court and two state superior courts. Because the Commission's position effectively renders *Nollan* and *Lucas* a nullity in California, we urge the Court to clarify that subsequent owners may challenge prior governmental action that amounts to either a regulatory or a physical taking.

A. Pending California Litigation.

To date, the case furthest along procedurally is *Daniel* v. *County of Santa Barbara*, No. 99-56887 (9th Cir., filed

December 16, 1999), which is pending (not yet argued) in the Ninth Circuit court of appeals. Ann Daniel and Leonard Hill bought their coastal property in 1997. At the time of their purchase, the California Coastal Commission had already extracted from a prior owner an offer to dedicate an easement. The offer was recorded long before this Court's decision in *Nollan*, and it is undisputed that no individualized determination of nexus or proportionality in accordance with *Nollan* or *Dolan* was ever made by any government agency. See App. at 6a, 9a, 10a, 21a n.39.[6]

In 1998, the County of Santa Barbara took action to accept the offer, and did so over the vigorous objections of Daniel and Hill. They first attempted to rescind their offer, then claimed both that the original offer to dedicate was null and void for failure to comply with *Nollan*, and that in any event the County's acceptance of the offer in the absence of the showing required by *Nollan* and *Dolan* was itself unconstitutional. *Id.* at 9a-10a. The County was unmoved, and Daniel and Hill were forced to sue.

The district court dismissed the complaint, stating that "[b]ecause the irrevocable offer was made prior to the time the Property was conveyed to plaintiffs, the taking had already occurred, and they have no standing to challenge it at this point." See App. at 26a; see also *id.* at 20a-26a. Misreading *Lucas* just as the Rhode Island Supreme Court did (see *id.* at 24a-26a), the district court treated the permit condition as a "'pre-existing limitation upon the landowner's title'" that was enforceable without regard to whether that limitation had been lawfully imposed as an original matter. *Id.* (quoting *Lucas*, 505 U.S. at 1028-29). The district court then held that the failure of the original owners to challenge the offer to dedicate relieved the County of any liability for an

[6] The district court's unpublished opinion in *Daniel* is reproduced in an appendix to this brief.

unconstitutional taking because all subsequent owners took title subject to that restriction. *Id.* at 21a n.39.

In reaching this holding, the district court attempted to distinguish *Nollan* as involving a party with "a leasehold interest with an option to buy" rather than a subsequent owner, (App. at 25a), but it overlooked the critical point that the Nollans, just like Daniel and Hill, "acquired the land well after the Commission had begun to implement its policy" (*Nollan*, 483 U.S. at 833 n.2), and were fully on notice that the Commission had required an easement in return for permission to build. The district court also accepted the same policy argument about the financial impact of receiving notice that was advanced and rejected in *Nollan*. The district court assumed that the price Daniel and Hill paid for the property "was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it." App. at 25a & n.40 ("the market price would account for the risk that the County would accept the outstanding offer"). That argument also was advanced, to no avail, in *Nollan*. See Brief of *Amicus Curiae* the Solicitor General of the United States at 17 n.12, *Nollan, supra*, (No. 86-133) ("[A]ppellants did not own the property when they applied for the development permit and/or when they received the Commission's decision. Presumably, therefore, the price paid by appellants for the property may have reflected any losses caused by the Commission's effort to impose a lateral access requirement on development.").[7]

[7] *See also* State AGs Br., at 16 (limitation "would have lowered the price the Nollans paid or should have paid for the property"); NRDC Br., at 22-23 n.16 ("the price the Nollans paid for their property should have—or at least could have—taken into account any impact of the public access condition imposed by the Coastal Commission"); Cities and Counties Br., at 8, (public access condition "was known and presumably taken into account by both the buyer (Nollans) and the seller and thus was reflected in the purchase price paid by the Nollans"; imposition of the condition "could not, therefore, have had an economic impact on the Nollans").

On appeal, the California Coastal Commission has submitted an *amicus* brief in support of the County, in which it claims that its permit conditions "are immune from attack." Brief of *Amicus Curiae* California Coastal Commission at 6-7, *Daniel, supra*. ("Commission's *Amicus* Br.") The Commission's position is that the owner's "predecessor-in-interest" failed to attack the original permit condition and hence the right to the "property covered by the easement was not part of the bundle of rights they purchased when they acquired this property:"

> Under California law, the conditions imposed by the Commission are *immune from attack*. *Appellants' predecessors in interest* not only failed to timely bring a judicial challenge to the validity of these conditions but accepted the benefit of the permits to which they were attached. As a result, res judicata and principles of estoppel apply and bar appellants' assault on the Commission's conditions. In turn, because these conditions are immune from attack and because the required offer was a recorded interest at the time appellants acquired the property at issue, appellants lack standing to assert that the County's action constituted a taking of a property interest which they possess. Simply put, appellants lack standing to assert that the County's action deprived them of the right to exclude the public from that portion of their property covered by the easement *because that right was not part of the bundle of rights they purchased when they acquired this property*.

Commission's *Amicus* Br., at 6-7 (emphasis supplied).

The Commission and the County have successfully advanced the same argument in similar litigation involving a different property pending in state court.[8] These cases chal-

[8] *See Parker* v. *California Coastal Comm'n.*, No. 305674 (San Francisco Cal. Super. Ct. Dec. 21, 1999) (demurrer granted) and *Cole* v. *Board of Supervisors*, No. 01003407 (Santa Barbara Cal. Super. Ct. Nov. 21, 2000) (demurrer granted) (collectively, the "*Stanford Farms Trust*" cases).

lenge both the imposition of the condition by the Commission, and separately the County's later acceptance, of a permit condition that could not possibly survive review under the nexus and proportionality standards required by *Nollan* and *Dolan*.[9] Moreover, in the former case, the Commission has actually filed a countersuit seeking civil penalties of up to $15,000 per day against the property owner for having the temerity to record a notice of rescission of the blatantly extortionate offer to dedicate that had been extracted from the previous owner.[10] The Commission's theory is not that the offer to dedicate could satisfy *Nollan* – for it plainly could not – but that the property owner is barred by state law from even recording notice of the owner's intent to challenge any agency's acceptance of that offer.[11] This physical takings issue thus bears not merely the "sound of 'old, unhappy, far-

[9] In the *Stanford Farms Trust* cases, the Commission exacted, and the County recently accepted, an offer to dedicate an owner's entire beachfront – some 77,000 square feet – in return for a permit to build a sunroom and deck totaling no more than 600 square feet. Not only did the development amount to a tiny fraction – 1/135 – of the area demanded, but the location of the development – nearly 1000 feet inland from a 60-foot high coastal bluff – means that the construction could have had no conceivable impact of any kind on public access to the beach.

[10] *See* Second Amended Cross-Complaint of California Coastal Commission at n.8 , *Parker* v. *California Coastal Comm'n, supra*, (filed March 3, 2000).

[11] *See* California Coastal Comm'n, *Public Access Action Plan* at 17, (June 1999) ("*Public Access Plan*"), *available at* http://www.coastal.ca.gov/access/accesspl.pdf. Because the California Coastal Commission may not, by law, hold title to coastal property, Cal. Pub. Res. Code § 30212; *see also Public Access Plan*, at 29, the offers to dedicate may be accepted only by other public agencies approved by the Commission; in advance of the acceptance, however, an owner has no way of knowing which entity will accept the offer, and the owner in this case thus recorded a rescission in order to give notice to any potential accepting agency and thereby to preserve his claim.

off things, and battles long ago,'" but of "sorrow, loss, or pain, that has been, and may be again." Cf. *Kaiser Aetna*, 444 U.S. at 177.

B. The California Coastal Commission's Policies Are Rendering *Nollan* A Nullity.

The impact of the pending California litigation extends far beyond the specific properties in question. At issue is whether the *Nollan* decision will be reduced in impact to a single property owner, or whether it will serve to restrain state and local governments from exacting, taking, and keeping easements in circumstances this Court previously branded extortionate.

The issue has become timely now, because until recently, the hundreds of offers to dedicate beachfront easements that the Commission automatically exacted over the last 25 years sat unaccepted by any local agency. As of June 1999, the Commission had extracted 1288 offers to dedicate public access easements across private coastal property, of which only 464 had been accepted. Because these offers to dedicate typically expire after 21 years, the Commission realized that if it did not push local governments to accept the outstanding offers, many would soon expire.

It is likely that many, if not all, of the affected properties are now in the hands of new owners.[12] Under the Commission's reasoning, and that of the district court in *Daniel*, all of these unlawful, extortionate takings are "immune from attack." This allows the State to acquire, for free, millions of dollars' worth of beachfront property that this Court made

---

[12] The average length of home ownership in California is 5-10 years. California Ass'n of Realtors, *House Finance Survey* (1999) (stating that the number of years repeat buyers stayed in their previous residence has remained at 5 years since 1992); Inman News Features, *Home Switchers Accelerate* (Nov. 19, 1998) *available at* http://news.inman.com/inmanstories.asp?ID=11469 (average length of home ownership in California is 10.5 years).

clear, in *Nollan*, could be seized by the state only if it were willing to "pay for it." 483 U.S. at 842.

This Court has long recognized that if the "objective of a state practice is to discourage the assertion of constitutional rights it is 'patently unconstitutional.'" *Corpus* v. *Estelle*, 414 U.S. 932, 933 (1973) (quoting *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 32 n.20 (1973)). *Amicus* therefore urges the Court, in addressing the Rhode Island Supreme Court's mistaken analysis of regulatory takings in the *Palazzolo* case, to clarify not only that the result below was wrong, but that the Rhode Island Supreme Court's reliance on the supposedly settled rule in physical takings cases is wrong as well. Subsequent owners receive the "full property rights" of the prior owner, *Nollan*, 483 U.S. at 834 n.2. They are therefore entitled to challenge unconstitutional takings that predate their ownership, whether that taking was in the form of an unlawful permit condition, an unlawful easement or other physical occupation, or the denial of beneficial economic uses of the property. In each case, the state must be held accountable when it is "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960).

CONCLUSION

For the foregoing reasons, the Court should reverse the holding of the Rhode Island Supreme Court that "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property."

Respectfully submitted,

MARK E. HADDAD
CATHERINE VALERIO BARRAD
RONALD L. STEINER
SIDLEY & AUSTIN
555 West Fifth Street
Suite 4000
Los Angeles, CA 90013
(213) 896-6000

CARTER G. PHILLIPS*
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Amicus Curiae

November 22, 2000

* Counsel of Record

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No.: CV 98-9453 MMM (AJWx)

ANN DANIEL and LEONARD HILL,

Plaintiffs/Petitioners,

vs.

COUNTY OF SANTA BARBARA, *et al.*,

Defendants/Respondents.

ORDER GRANTING DEFENDANT COUNTY OF SANTA BARBARA'S MOTION TO DISMISS

[filed Oct. 13, 1999]

[entered Oct. 14, 1999]

In 1997, plaintiffs Ann Daniel and Leonard Hill purchased a beachfront home on Padaro Lane in Santa Barbara County (the "Property"). The Property had once been part of a larger parcel belonging to Carl Johnson, which Johnson subdivided into four lots in 1974. The California Coastal Commission approved Johnson's subdivision map on the condition that he make an offer, irrevocable for 25 years, to dedicate a public access easement, consisting of a 5 foot wide walkway, across his property from Padaro Lane to the mean-high tide mark. In 1977, Johnson obtained a permit to build a residence on what was later to become plaintiffs' property. The permit contained the same condition.

On April 7, 1987, in response to a demand by the California Coastal Commission, the Property's subsequent owners, Bruce and Darleine Bucklew, signed an "Irrevocable Offer to Dedicate" the 5 foot public access walkway. This offer was recorded on April 9, 1987 in the Official Records of Santa Barbara County. Neither Carl Johnson nor the Bucklews are parties to this suit.

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On September 15, 1998, Santa Barbara County gave them notice that, on October 6, 1998, it would consider whether to accept the 1987 Offer. On October 5, 1998, plaintiffs attempted to rescind the 1987 Offer. They filed written objections and reiterated their protests at the public hearing. Nonetheless, on October 20, 1998, the Board of Supervisors adopted a resolution accepting the Bucklews' 1987 Offer as well as many similar offers to dedicate public access easements.

Plaintiffs filed this declaratory relief suit against the County on November 24, 1998, alleging a physical taking in violation of the Takings Clause of the Fifth Amendment of the United States Constitution. Additionally, they alleged a taking in violation of Article I, § 19 of the California Constitution and other pendent state claims for quiet title and violation of the California Environmental Quality Act (CEQA).

The County has moved to dismiss, contending that (1) plaintiffs' takings challenge is not ripe for decision because their predecessors-in-interest failed timely to exhaust their state remedies and never sought just compensation; (2) the California Coastal Commission is an indispensable party that cannot be joined because it enjoys Eleventh Amendment immunity from suit in federal court; (3) plaintiffs and their predecessors-in-interest waived their right to challenge the conditions by enjoying the benefits of the permits that were issued; (4) plaintiffs' takings claim is time-barred because the statute of limitations on it began to run when the Commission imposed conditions on the issuance of the subdivision map

and building permits in 1974 and 1977, respectively; (5) plaintiffs lack standing to sue for conditions that were proposed by the Commission and accepted by their predecessors-in-interest because plaintiffs purchased the property subject to the conditions; and (6) a stay of the action in favor of state court remedies is appropriate under the *Pullman* abstention doctrine.

The court's threshold inquiry must be whether plaintiffs have a viable federal constitutional claim, since that is the basis upon which jurisdiction is invoked. Plaintiffs' Fifth Amendment takings challenge is based on the alleged unconstitutional conditions the Commission attached to its issuance of permits to Johnson in 1974 and 1977, and its demand that those conditions be reaffirmed by the Bucklews in 1987. Neither Johnson nor the Bucklews challenged the conditions, and they attached to the Property prior to the time plaintiffs took title to it. For this reason, plaintiffs lack standing to pursue a takings claim. Moreover, any takings claim is time-barred because it accrued in 1974 and 1977, when the conditions were imposed, and no later than 1987, when they were reaffirmed by the Bucklews in response to a demand by the Commission.

Finally, even if plaintiffs had standing to raise a takings claim, and even if such a claim were not time-barred, it would not be ripe for decision because plaintiffs have not (and cannot) allege an essential element of the claim – that the state refused to compensate them or the prior owners for the purported taking. Accordingly, the court finds that plaintiffs' federal claims are non-justiciable and must be dismissed. Consequently, it need not address the County's arguments regarding abstention, waiver and the absence of an indispensable party from the suit. Additionally, the court concludes that it is appropriate at this early stage of the litigation to dismiss plaintiffs' pendent state claims.

I. FACTUAL BACKGROUND

In deciding a motion to dismiss under Rule 12(b)(6), the court's review is limited to the contents of the complaint. *Campanelli v. Bockrath*, 100 F.3d 1476, 1479 (9th Cir. 1996). All allegations of material fact must be taken as true, and construed in the light most favorable to the non-moving party. *Smith v. Jackson*, 84 F.3d 1213, 1217 (9th Cir. 1996). For this reason, the statement of facts that follows recites and accepts as true the allegations contained in plaintiffs' complaint. Additionally, because one of the bases for this motion is an asserted lack of subject matter jurisdiction, the court is authorized under Rule 12(b)(1) to consider facts beyond the face of the complaint and has done so in this instance.

A. Carl Johnson

In 1973, Carl D. Johnson owned the Property as part of a larger parcel. Johnson applied to Santa Barbara County for approval to divide the parcel into four separate lots. As proposed, the division included a private 30-foot driveway and a private 5-foot walkway to the beach for the owners of the four parcels to use.[1] On December 6, 1973, the County approved "Parcel Map No. 11,909" (the "Parcel Map"), dividing the land into four parcels designated Parcels "A" through "D." Parcel "A" later became plaintiffs' Property.[2]

In early 1974, Johnson submitted an application to the California Coastal Commission (Application No. 26-25) for approval of the Parcel Map. On April 11, 1974, the South Central Coast Regional Commission conditionally approved the map. One of the two conditions read as follows:

> Applicant shall offer for dedication to the County of Santa Barbara or its successor in jurisdiction, for

[1] Complaint, ¶ 7.

[2] *Id.*, ¶ 8.

> recreational pedestrian and bicycle access an easement 5' in width from Padaro Lane to the mean high tide line coinciding with the 30' ingress and egress right-of-way delineated on the lot split map accompanying the Application. Said offer shall be a firm continuing offer of dedication which is not rejected or vitiated by failure to accept or purported rejection for a period of 25 years, unless the County has in the meantime provided beach access within a distance of 300 yards upcoast or downcoast of this parcel. The offer of dedication shall be conditioned on assumption by the County of Santa Barbara or its successor, of the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement."[3]

Johnson appealed the foregoing Permit Condition to the California State Coastal Zone Conservation Commission.[4] On May 15, 1974, that Commission found that the appeal raised "no substantial issue[s]" and confirmed the decision of the Regional Commission.[5] Johnson did not appeal the decision further or seek any judicial remedy. On September 12, 1974, Parcel Map No. 11,909 was recorded in Santa Barbara County's official records, thereby completing the division of the land into four parcels.[6]

In 1977, Johnson submitted an application for a Coastal Development Permit to the California Coastal Commission in

[3] *Id.*, ¶ 9.

[4] *Id.*, ¶ 10.

[5] *Id.*, ¶ 11.

[6] *Id.*, ¶ 12. Plaintiffs allege that neither the County nor the California Coastal Commission required the execution and recordation of a separate document embodying the offer to dedicate at any time prior to recordation of the Parcel Map. Thus, they assert the act of recordation constituted the offer satisfying the permit condition. *Id.*

order to build a residence for his family on the Property.[7] On September 16, 1977, the Commission approved issuance of Coastal Development Permit No. 141-19 (the "CDP"), which included a "Special Condition" identical to the condition imposed on the Parcel Map quoted above.[8] Johnson constructed a residence on the Property in 1978 as authorized by the CDP.[9]

Plaintiffs allege that neither at the time the permit conditions were imposed, nor at any time thereafter, did issuing authorities make an individualized determination that the activity authorized by the permits (i.e., subdividing the parcel into four lots and building a residence) would adversely impact the public's ability to access the publicly-owned, adjacent beach.[10] Rather, they contend, there has never been a rational relationship between the conditions imposed and the Property's development and use.[11] Plaintiffs also assert that at the time the permit conditions were imposed, the County made no offer of monetary compensation in exchange for the concessions.[12]

B. The Bucklews

On April 8, 1987, Bruce and Darleine Bucklew, who were then the owners of the Property, executed an "Irrevocable Offer to Dedicate," which was dated April 7, 1987 and was recorded on April 9 in the Official Records of Santa Barbara County as Instrument No. 1987-025967 ("the 1987 Offer").

---

[7] *Id.*, ¶ 13.

[8] *Id.*, ¶ 14.

[9] *Id.*, ¶ 15.

[10] *Id.*, ¶¶ 16, 19, 20.

[11] *Id.*, ¶¶ 17, 18.

[12] *Id.*, ¶ 21.

The 1987 Offer makes specific reference to the CDP.[13] Plaintiffs allege that California Coastal Commission officials threatened and intimidated the Bucklews into signing the 1987 Offer, and that they signed it only under duress. Prior to the execution of the 1987 Offer, Commission officials sent the Bucklews a letter that stated:

> "If this permit condition [requiring that an offer to dedicate be signed] still has not been met, please be advised that you are in violation of the Coastal Act of 1976. Those found in violation of the coastal Act are subject to court action for an injunction and/or a fine of $10,000, plus an additional fine of not less than $50 nor more than $5000 for each day a violation continues (Public Resources Code Sections 30820-23)."[14]

Plaintiffs assert that the Bucklews received no consideration for their execution of the 1987 Offer since the Commission had no legal basis for threatening to bring an enforcement action against them. They further assert that the 1987 Offer was prepared by Commission employees who knew or should have known that the document did not conform to the permit conditions in several respects, including the fact that it purported to extend the life of the Offer 13 years beyond the original expiration date.[15]

Plaintiffs allege that at no time prior to the execution and recordation of the 1987 Offer did any official or employee of the Commission or the County explain to the Bucklews (a) that the 1987 Offer was substantively different from the permits conditions; or (b) that the 1987 Offer purported to

---

[13] A copy of the 1987 Offer is attached to plaintiffs' complaint as Exhibit "B."

[14] Complaint, ¶ 23.

[15] *Id.*, ¶ 25.

grant rights substantially beyond those mandated by the conditions.[16]

On June 26, 1987, ten weeks after the execution and recordation of the 1987 Offer, the United States Supreme Court issued its ruling in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). *Nollan* held that a public access condition the California Coastal Commission had placed upon issuance of a building permit for a single family residence was a Fifth Amendment taking that required just compensation.[17] Plaintiffs allege that prior to June 26, 1987, officials and employees of the Commission knew that (a) *Nollan* was pending before the United States Supreme Court, (b) the case involved a challenge to the public access program administered by the Commission, (c) the Supreme Court had granted review after the California Court of Appeal issued a ruling favorable to the Commission, suggesting that the prior ruling was invalid; (d) the Supreme Court had heard oral argument in *Nollan* on March 30, 1987, and was expected to issue its opinion shortly; and (e) the public access program might have to be terminated or substantially restricted depending on the Court's decision in *Nollan*.[18] Plaintiffs allege the Commission withheld the foregoing information regarding *Nollan* from the Bucklews prior to the recordation of the 1987 Offer,[19] that Commission officials had superior knowledge and experience as compared with the Bucklews and that the Commission owed the Bucklews a duty of full disclosure and fair dealing consistent with elemental notions of procedural due process.[20]

---

[16] *Id.*, ¶ 26.

[17] *Id.*, ¶ 27.

[18] *Id.*, ¶ 28.

[19] *Id.*, ¶ 29.

[20] *Id.*, ¶ 30.

Plaintiffs allege that prior to the Bucklews' execution of the "Irrevocable Offer to Dedicate" on April 8 1987, neither the Commission nor the County made an individualized determination that the earlier development of the Property that was the purported justification for the 1987 Offer would adversely impact the public's ability to access the publicly-owned, adjacent beach.[21] Nor, allegedly, did either ever make an individualized determination that the conditions contained in the 1987 Offer were roughly proportional to the impact generated by development of the Property. Rather, plaintiffs contend, there has never been a rational relationship between the conditions in the offer and the Property's development and use.[22] Plaintiffs also assert that neither the Commission nor the County offered the Bucklews any monetary compensation for the exaction.[23]

C. Plaintiffs Ann Daniel and Leonard Hill

Plaintiffs Ann Daniel and Leonard Hill purchased the Property in 1997. On or about September 15, 1998, the County notified them that it intended to consider whether to accept the 1987 Offer at a meeting on October 6, 1998.[24] On October 5, 1998, plaintiffs served a notice of rescission of the 1987 Offer on the County. They also objected in writing and at the public hearing to the imposition of the conditions and extraction of the offer.[25] On October 20, 1998, following a public hearing, the Board of Supervisors adopted Resolution No. 98-389 titled "Resolution of Acceptance of Offers and

---

[21] *Id.*, ¶ 31.

[22] *Id.*, ¶¶ 32, 35.

[23] *Id.*, ¶¶ 35, 36.

[24] *Id.*, ¶ 37.

[25] *Id.*, ¶¶ 39-41.

Irrevocable Offers to Dedicate Public Access Easements."[26] Plaintiffs allege that adoption of the resolution was a discretionary act and that the Board was so informed by County Counsel.[27]

Plaintiffs contend that as of October 20, 1998, the County had not made an individualized determination that development of the Property would have an adverse impact on the public's ability to access the publicly-owned, adjacent beach,[28] or that the extent of the exaction was roughly proportional to the impact of the Property's development.[29] Additionally, they assert that as of that date, there was no rational relationship between the exaction achieved by the Resolution and any impact caused by the development, nor any findings that activity on the Property justified adoption of the Resolution.[30] As of October 20, 1998, the County had not offered Daniel and Hill any monetary compensation for the exaction effected by the Resolution.[31] Further, the County has allegedly not complied with the permit's requirement that it assume "the burden of maintenance of the easement and the beach area to which access is provided, together with the burden of public liability on the easement."[32]

---

[26] *Id.*, ¶ 42. A copy of the resolution is attached to plaintiffs' complaint as Exhibit "C."

[27] *Id.*, ¶ 43.

[28] *Id.*, ¶ 44.

[29] *Id.*, ¶ 48.

[30] *Id.*, ¶¶ 45-47.

[31] *Id.*, ¶ 49.

[32] *Id.*, ¶ 38.

II. DISCUSSION

A. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(1)

A party asserting that the court lacks subject matter jurisdiction of an action may raise the issue by filing a motion pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Even where defendant is the moving party, plaintiff bears the burden of establishing that the court has subject matter jurisdiction. See *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); *Stock West, Inc. v. Confederated Tribes*, 873 F.2d 1221, 1225 (9th Cir. 1989).

A Rule 12(b)(1) challenge may be facial (i.e., based solely on the allegations contained in the complaint) or factual (i.e., based on extrinsic evidence presented for the court's consideration). See *Thornhill Publishing Co. v. General Tel. & Electronics*, 594 F.2d 730, 733 (9th Cir. 1979) (facial attack); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881 (5th Cir. 1992) (challenge based on extrinsic evidence). Where facial, the court must accept the allegations of the complaint as true. See *Valdez v. United States*, 837 F.Supp. 1065, 1067 (E.D.Cal. 1993), aff'd., 56 F.3d 1177 (9th Cir. 1995). Where factual, the court may weigh the evidence presented in order to determine the facts and evaluate whether it has power to hear the case. See *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987).

The County has attacked the court's jurisdiction to hear plaintiff's constitutional claim on multiple bases: (1) that it is not ripe for review because plaintiffs and their predecessors-in-interest failed to pursue state court remedies, including attempted recovery of "just compensation" for the alleged Fifth Amendment taking; and (2) that plaintiffs purchased the Property subject to the recorded 1987 Offer, and thus lack standing to challenge the validity of the procedures by which it was obtained. These issues are properly raised by a Rule 12(b)(1) motion. See, e.g., *Bland v. Fessler*, 88 F.3d 729,

732, n. 4 (9th Cir. 1996) (ripeness properly challenged under Rule 12(b)(1)); *Medina v. Clinton*, 86 F.3d 155, 157 (9th Cir. 1996) (affirming district court's dismissal for lack of standing under Rule 12(b)(1)); *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989) (motions raising ripeness are treated as having been brought under Rule 12(b)(1)); *Coye v. Sullivan*, 1991 WL 319038, * 1 (E.D.Cal. 1991) (because standing implicates subject matter jurisdiction, it is properly challenged under Rule 12(b)(1)).

The County has proffered state records documenting its actions respecting the Property, and the court has accepted and considered this evidence in evaluating defendant's ripeness and standing arguments.

B. Legal Standard Governing Motions To Dismiss Under Rule 12(b)(6)

A Rule 12(b)(6) motion tests the legal sufficiency of the claims asserted in the complaint. A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Johnson v. Knowles*, 113 F.3d 1114, 1117 (9th Cir. 1997); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989) (quoting *Conley*), cert. denied, 496 U.S. 906 (1990). In other words, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1988).

As noted above, in deciding a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. *Campanelli, supra*, 100 F.3d at 1479; *Allarcom Pay Television, Ltd. v. General Instrument Corp.*, 69 F.3d 381, 385 (9th Cir. 1995). The court must accept all factual allegations pleaded in the complaint as true, and must construe them and draw all reasonable inferences from them

in favor of the nonmoving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996); *Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), citing *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987); *NL Indus. Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). It need not, however, accept as true unreasonable inferences of conclusory legal allegations cast in the form of factual allegations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1030 (1981).

The court may not consider material outside the complaint (e.g., facts presented in briefs, affidavits, or discovery materials) in ruling on a Rule 12(b)(6) motion. *In re American Continental Corp./Lincoln Savings & Loan Securities Litigation*, 102 F.3d 1524, 1537 (9th Cir. 1996). Nonetheless, it may properly consider exhibits submitted with the complaint, documents whose contents are alleged in the complaint when their authenticity is not questioned, and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. 1989); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994), cert. denied, 114 S. Ct. 2704 (1994).

Because statutes of limitations are not generally regarded as jurisdictional, challenges asserting that a complaint is time-barred are properly considered under Rule 12(b)(6). See *Kesselring v. F/T Arctic Hero*, 95 F.3d 23, 24 (9th Cir. 1996) ("Provisions phrased as time limits on filing court actions are generally interpreted as statutes of limitations, not as jurisdictional bars"). Cf. *Lord v. Babbitt*, 943 F.Supp. 1203, 1209 and n. 4 (D. Alaska 1996) (addressing a challenge to plaintiff's complaint based on the statute of limitations under Rule 12(b)(6) rather than Rule 12(b)(1) because federal statutes of limitations are no longer jurisdictional). Here, defendant contends that plaintiffs' claims are time-barred because the statute of limitations began to run in 1974 or

1977, when the conditions were first imposed or, at the latest, in 1987, then the Bucklews signed the irrevocable offer.

C. Fifth Amendment Takings Claim

The Takings Clause of the Fifth Amendment provides: "[N]or shall property be taken for public use, without just compensation." The Fourteenth Amendment's Due Process Clause makes the clause applicable to the States. See *Dolan v. City of Tigard*, 512 U.S. 374, 384, n. 5 (1994). Takings claims generally may be "divided into two classes: permanent physical occupation claims and regulatory takings." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 684 (9th Cir. 1993), cert. denied, 510 U.S. 1093 (1994). "A physical occupation occurs when the government physically intrudes upon private property either directly or by authorizing others to do so. A regulatory taking occurs when the value or usefulness of private property is diminished by a regulatory action that does not involve a physical occupation of the property." *Id.*

Plaintiffs seek declaratory relief to remedy a "physical taking of private property." They allege that unless the Resolution of Acceptance is invalidated, it will effect a physical taking of their Property, for which they "have received no compensation" and for which "the County is offering no such compensation."[33] Plaintiffs claim that (1) the initial permit conditions were void; (2) the 1987 Offer was void when made; (3) if the 1987 Offer was ever valid, it became void by virtue of the Supreme Court's decision in *Nollan*; and (4) even if the permit conditions and the 1987 Offer are valid, the Board of Supervisors' Resolution of Acceptance "in and of itself, accomplished a taking of property without compensation."[34]

---

[33] First Amended Complaint, ¶ 54.

[34] *Id.*, ¶ 55(d).

The County vigorously disputes plaintiffs' assertion that a physical taking has occurred. The issue is key, since characterization of the claim as a physical or a regulatory taking will affect when the claim accrued for statute of limitations purposes, whether it is ripe for relief, and whether plaintiffs have standing to sue. Plaintiffs contend there was a physical taking when the County accepted the 1987 Offer and took title to the easement. Additionally, they assert that a physical occupation will inevitably occur when the public is permitted to use the walkway. The County claims that plaintiffs' "characterization of this lawsuit as one for a physical taking rather than a regulatory taking is a transparent attempt to avoid procedural defects which bar a regulatory taking claim in this instance – the statute of limitations and the doctrines of ripeness and res judicata."[35] It contends that plaintiffs' claim is instead based on a "regulatory taking," since the irrevocable offer to dedicate a public access easement was obtained pursuant to a regulatory scheme by which the Commission granted subdivision and building permits conditioned on the execution of such offers.[36]

To a certain extent each party's characterization is correct, since the factual scenario does not fit neatly into either of the two categories, and embodies characteristics of both.

---

[35] Def.'s Mot. at 1:9-13.

[36] Characterized as a regulatory taking, the County asserts that plaintiffs' claim is actually a facial challenge to the Coastal Act or to the Commission's permitting program. Regulatory takings may be attacked by challenging the facial constitutionality of a statute or land use regulation, or by arguing that the statute is unconstitutional as applied to the plaintiff. "A facial challenge involves 'a claim that the mere enactment of a statute constitutes a taking,' while an as-applied challenge involves 'a claim that the particular impact of government action on a specific piece of property requires the payment of just compensation.'" *Levald, supra*, 998 F.2d at 686 (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987), cert. denied, 510 U.S. 1093 (1994)).

Plaintiffs claim that, through a regulatory scheme, the government imposed unconstitutional conditions on the issuance of a public benefit, i.e. a development permit. Because the conditions imposed required that the landowners make an irrevocable offer to dedicate an easement over the land, however, the taking effected was physical in nature. The real question is whether the alleged taking occurred at the time the irrevocable offer to dedicate was extracted (i.e., 1974 and 1977 or 1987), or only when the County accepted the offer in 1998.

1. When A Taking Occurs

Courts have generally found that a permanent physical invasion of private property constitutes a *per se* taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982) (cable television operators installation of cabling on landlords' apartment buildings pursuant to New York law constituted a taking under "the traditional rule that a permanent physical occupation of property is a taking"); *Levald, supra*, 998 F.2d at 684 (permanent physical occupation of property sufficient to support a takings claim occurs when the government physically intrudes upon private property either directly or by authorizing others to do so).

A taking also occurs when government takes title to property, in whole or in part, prior to any physical invasion. See *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (a taking occurs under the Fifth Amendment when "the government [has authorized] a physical occupation of property (or actually takes title)"); *Chicago, R.I. & P. Ry. Co. v. United States*, 284 U.S. 80, 96 (1931) (a taking "may result from a taking of the use of property . . . quite as well as from the taking of the title"). Additionally, a taking can occur when government action creates a cloud on the title to property that decreases its value. See *J.B. Ranch v. Grand County*, 958 F.2d 306, 309 (10th Cir. 1992) (a cloud on title to property causing a diminution of land values constitutes a taking).

2. The *Nollan* and *Dolan* Cases

In both *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, two Supreme Court cases involving development exactions,[37] the Court held that government action constituted a physical taking because it deprived the property owner of the right to exclude others from the property. *Nollan* held "that a 'permanent physical occupation' ha[d] occurred, for purposes of [the *Loretto*] rule, where individuals [were] given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan, supra*, 483 U.S. at 832. Courts have interpreted "*Nollan* and *Dolan* . . . as extending the analysis of complete physical occupation cases to those situations in which the government achieves the same end (i.e., the possession of one's physical property) through a conditional permitting procedure." *Clajon, supra*, 70 F.3d at 1578; see also *Nollan, supra*, 483 U.S. at 841 (stating that the Court will be "particularly careful" in assessing cases where an owner is required to convey property in exchange for the lifting of a land-use restriction because of the "heightened risk" that the purpose of the exaction is "avoidance of the compensation requirement, rather than the stated police power objective"); *Garneau v. City of Seattle*, 147 F.3d 802, 812 (9th Cir. 1998) ("Because *Nollan* and *Dolan* both involved physical invasions of private property, the Court found the exactions were *per se* takings").

---

[37] A "development exaction" is a governmental requirement that a property owner dedicate some portion of his or her land for public use before granting that property owner a permit to develop the land. This 'exaction' of land often involves the actual deeding of some of the property to the public – either through an easement or an outright transfer of the land. See *Clajon Production Corporation v. Petera*, 70 F.3d 1566, 1578, n. 20 (10th Cir. 1995).

In *Nollan*, which is factually most similar to the case at bar, the owners of the beachfront lot proposed to demolish a small bungalow on the property and build a larger house. As required by California law, they applied to the California Coastal Commission for a building permit. The Commission issued a building permit conditioned on the property owners' recordation of a deed restriction granting a public access easement over their land. *Nollan, supra*, 483 U.S. at 828. The Court affirmed the rule "that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Id.* at 824. It held, however, that to escape takings liability, there must be an "essential nexus" between the conditions imposed and the legitimate state interest identified. The Court concluded that the condition imposed by the Commission "utterly fail[ed]" to achieve its stated objectives – protecting the public's ability to see the beach, assisting the public in overcoming the perceived "psychological" barrier to using the beach, and preventing beach congestion. Thus, it concluded, the easement condition was nothing more than "an out-and-out plan of extortion." *Id.* at 837.

In the 1994 case of *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court granted certiorari to determine the degree of connection required between a development exaction and the impact of the property owner's proposed project. See *id.* at 377. *Dolan* involved an application to expand a plumbing and electrical supply store and pave a thirty-nine space parking lot. *Id.* at 379. Pursuant to its comprehensive development plan, the city granted a permit on the condition that the owner dedicate property along the creek behind the property for storm drainage and an additional adjacent fifteen-foot wide strip as a pedestrian/bicycle pathway. The Court held that both conditions satisfied the "essential nexus" requirement announced in *Nollan*. The Court noted that the proposed

parking area would increase water runoff, that the state had a legitimate interest in controlling flood problems, and that the storm drainage condition was directly related to concern. Additionally, it stated that the store's expansion would increase traffic in the downtown area, that the state had a legitimate interest in reducing traffic congestion, and that the pedestrian/bicycle pathway would lessen increased traffic flow in nearby streets. *Id.* at 387-88.

Having determined that the requisite nexus was present, the Court next considered whether the degree of the exactions was consonant with the projected impact of the proposed development. Noting that "a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the Fifth Amendment," it placed the burden on the government to establish "rough proportionality" by making some sort of individualized finding. It stated that, while "[n]o precise mathematical formula is required, . . . the city must make some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset" the conditions created by the proposed development. *Id.* at 395-96. The Court held that proper findings of rough proportionality had not been made. *Id.*

In *Garneau*, the Ninth Circuit explained that *Nollan* and *Dolan* establish a three-part test for determining whether a taking has occurred in connection with the imposition of development conditions. "First the court asks whether government imposition of the exaction would constitute a taking. Second is the 'essential nexus' test, which asks whether the government has a legitimate purpose in demanding the exaction. Third is the 'rough proportionality' test, which asks whether the exaction demanded is roughly proportional to the government's legitimate interests." *Garneau, supra*, 147 F.3d at 809. The court noted that "[t]he first inquiry ignores the government's land use power, and asks only whether government imposition of the exaction would be a taking," while "[t]he second and third inquiries

seek to determine whether the government may shield itself from a takings claim through the use of its police powers." *Id.* at 809, 810. For purposes of the present motion, then, the key question is the first – did the Commission's exaction of an irrevocable offer to dedicate an easement over the Property constitute a taking, or did any taking occur only later when the government perfected its title to the easement or the first uninvited person used the public access.

3. Application To The Instant Case

In *Nollan* and *Dolan*, the imposition of an allegedly unconstitutional condition resulted in the immediate dedication of property for public purposes. Thus, the government's imposition of conditions through the permitting process effected a physical invasion or occupation of the landowners' property. Here, by contrast, in 1974 and 1977, the Commission required that Johnson make an irrevocable offer to dedicate an easement over the Property, but the County did not immediately accept the offer. Similarly, in 1987, the Bucklews were required to extend the term of the irrevocable offer for a period of thirteen years.[38] Again, the County did not immediately accept the offer. Nonetheless, in each instance, the Commission exacted – and thus "took" from the property owners – the right to a future easement over the Property. The County obtained what was essentially equivalent to an option, which was valuable to it and gave it a property interest under California law. See *County of San Diego v. Miller*, 13 Cal.3d 684, 693 (1975) (owner of an unexercised option to purchase land possesses a property right). At a minimum, from the time it was made, the irrevocable offer placed a cloud on title to the Property and diminished its value. Thus, the alleged taking occurred at the point when the government exacted the concession from the

[38] Because the court concludes that any taking that occurred took place as early as 1974, it need not decide whether the extension of the irrevocable offer's term effected an additional taking.

property owners. The fact that there was no physical entry on the land until later does not alter this fact.[39]

Plaintiffs contend that, if this is true, the County's acceptance of the irrevocable offer to dedicate in 1998 should nonetheless be treated as a separate taking under either a "continuous" or "incremental" takings theory. Continuous takings have been found where the government allows a taking to occur by a continuing process of physical events, such as by gradual flooding. In such a case, the plaintiff may postpone filing suit until the nature and extent of the taking becomes clear. See *United States v. Dickinson*, 331 U.S. 745, 749 (1947). In *Dickinson*, the Supreme Court refused to set a firm date upon which a takings claim based on flooding caused by a dam accrued, stating that, in cases involving intermittent flooding, plaintiff's cause of action does not accrue until "the situation becomes stabilized." *Id.* Thus, the plaintiff in such a case may postpone filing suit until "the consequences of inundation have so manifested themselves that a final account may be struck." *Id.* Invoking *Dickinson*, plaintiffs assert that the situation regarding the Property did

[39] Plaintiffs contend that no taking occurred in 1974, 1977 or 1987 because the irrevocable offer granted by Johnson and extended by the Bucklews was void *ab initio*, or became void following the Supreme Court's 1987 decision in *Nollan*. Because the Nollans challenged the Coastal Commission's permitting procedures "as applied" to them, the decision in their favor did not void other dedications exacted by the Commission. *Nollan, supra*, 483 U.S. at 837-38; see also *id.* at 852, n. 6 (Brennan, J., dissenting) (the case "is a challenge to the permit condition as applied to the Nollans' property, so the presence or absence of seawalls on other property is irrelevant"). Indeed, the core holding of *Nollan* and *Dolan* is that there must be an individualized inquiry into the "nexus" between the condition imposed and the impact of the proposed development, as well as their "rough proportionality." The alleged failure to conduct this type of inquiry prior to imposing conditions on Johnson's permits might well have resulted in a finding of unconstitutional taking had the matter been raised when the conditions were imposed. The fact that neither Johnson nor the Bucklews mounted such a challenge or sought "just compensation," however, does not now render the conditions void.

not become stable, and their damages ascertainable, until the County accepted the irrevocable offer to dedicate.

The Supreme Court and other courts have interpreted *Dickinson* narrowly. In *United States v. Dow*, 357 U.S. 17, 27 (1958), the Court stated that *Dickinson* held only that the statute of limitations does not bar a takings claim based on flooding "when it [is] uncertain at what stage in the flooding operation the land ha[s] become appropriated to public use." Other cases have adopted this reading of *Dickinson* and its reference to "stabilization." See *Applegate v. United States*, 25 F.3d 1579, 1582 (Fed. Cir. 1994) ("The expressly limited holding in *Dickinson* was that the statute of limitations did not bar an action under the Tucker Act for a taking by flooding when it was uncertain at what stage in the flooding operation the land had become appropriated to public use"); *Kabua v. United States*, 546 F.2d 381, 384 (Fed. Cir. 1976) (in *Dow*, the Supreme Court "more or less limited [*Dickinson*] to the class of flooding cases to which it belonged, when the landowner must wait in asserting his claim, until he knows whether the subjection to flooding is so substantial and frequent as to constitute a taking"); *Hilkovsky v. United States*, 504 F.2d 1112, 1114 (Ct.Cl. 1974) (*Dow* "distinguished the flooding situation in *Dickinson* from other types of Government taking because, in the slow flooding situation in *Dickinson*, the full extent of the Government taking could not be known until the high water mark of the flooding had been reached"); *Cavin v. United States*, 19 Cl.Ct. 190, 197 (1989) (finding that the *Dickinson* stabilization doctrine was inapplicable where the Forest Service's actions were deliberate and discrete; "the stabilization doctrine speaks to situations involving continuing physical processes, such as gradual flooding").

The events underlying this case are not easily analogized to flooding or other continuous natural processes where stabilization is difficult to pinpoint. A taking either did or did not occur when the Commission imposed conditions on

Johnsons' permits, and when the Bucklews extended the irrevocable offer to dedicate. If it did, then its value could have been fixed, much as an option to purchase land may be valued and reduced to a sum certain. *Dickinson*, therefore, does not support plaintiffs' invocation of a continuous takings theory here.

Plaintiffs alternatively contend that there have been multiple, incremental takings in this case. Under this theory, the first takings occurred when the permit conditions were imposed in 1974 and 1977. An additional taking occurred when the Coastal Commission required that the Bucklews extended the irrevocable offer to dedicate for a period of thirteen years. The exaction from the Bucklews may well have constituted a second taking, since the government extracted an extension of the term of the offer without compensation. See *A.J. Hodges Industries, Inc. v. United States*, 355 F.2d 592, (Ct.Cl. 1966) (flights of Government-owned B-47 aircraft over private land constituted the taking of an easement in the overhead airspace if the flights were so low and frequent as to interfere directly and immediately with the use and enjoyment of the land, and the introduction of B-52 bombers, which were twice as large as the B-47s and noisier, constituted an additional taking). Plaintiffs contend that yet another taking occurred when the county accepted the irrevocable offer to dedicate. They assert that this action was significantly more invasive of their property rights, and that it was not until the County accepted the offer that they lost their right to exclude others from the Property.

What the plaintiffs claim has been taken from them was, in fact, taken from Johnson in 1974 and 1977, and/or from the Bucklews in 1987. If Johnson or the Bucklews *had* sought and received just compensation for those takings when they occurred, plaintiffs could not now claim additional compensation based on the County's acceptance of the offer to dedicate. The fact that the prior owners failed to seek or receive just compensation does not change the fact that a

taking occurred. Thus, the court concludes that any taking that occurred took place at the time the condition requiring that Johnson make the irrevocable offer to dedicate was imposed and/or at the time the Bucklews were required to extend the term of the offer.

D. Standing To Sue

The County contends that plaintiffs lack standing to bring a takings claim because the offers to dedicate were obtained from prior owners of the Property, and plaintiffs did not acquire the property until years later in 1997. Because plaintiffs did now own the property when the offers were exacted, the County contends they never acquired the interest purportedly taken, and consequently lack standing to assert a Fifth Amendment claim.

What has been taken from the bundle of a property owner's rights cannot be transferred to a subsequent owner. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992) ("Where the State seeks to sustain regulation that deprives land of all economically beneficial use, . . . it may resist compensation only if . . . inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with"); *Danforth v. United States*, 308 U.S. 271, 284 (1939) (it is undisputed that "since compensation is due at the time of taking, the owner at that time, not the owner at an earlier or later date, receives the payment"); *United States Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 268 (2d Cir.), cert, denied, 469 U.S. 982 (1984) ("Only the owner of an interest in property at the time of [an] alleged taking has standing to assert that a taking has occurred"); *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed.Cir. 1992) (claimants could not maintain suit alleging that the government took real property without just compensation unless they established undisputed ownership of the property at time of the taking); compare *Nollan*, *supra*, 483 U.S. at 827-28 (although the Nollans had not acquired ownership of the property prior to the State's decision to

condition a coastal development permit on their consent to an easement, they held a leasehold interest with an option to buy).

Plaintiffs have not alleged that they purchased the property without notice of the permit condition and irrevocable offer to dedicate, both of which were recorded and evident in the chain of title. See *United States v. Dow*, 357 U.S. 17, 20 (1958) (it was not inequitable that a subsequent owner had no takings claim since he "took his deed with full notice of the condemnation proceeding," and had "readily available contractual means by which he could have protected himself vis-a-vis his grantors against the contingency" that he would have no claim). The price plaintiffs paid for the land was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it.[40] "A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken." *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), overruled on other grounds, *WMX Technologies, Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). Consequently, plaintiffs lack standing to challenge the exaction under the Takings Clause of the Fifth Amendment.

Nor can plaintiffs acquire standing by claiming that a separate taking occurred when the County voted to accept the offer to dedicate. The mere exercise of a pre-existing right does not effect a taking. See *Lucas*, *supra*, 505 U.S. at 1028-

---

[40] Because plaintiffs and the seller had full information regarding the irrevocable offer to dedicate, and the *Nollan* decision, the market price would account for the risk that the County would accept the outstanding offer. This follows from the efficient market hypothesis, that market prices "at any time 'fully reflect' all available information." Eugene Fama, *Efficient Capital Markets: A Review of Theory and Empirical Work*, 25 J. Fin. 383, 383 (1970).

29 ("we assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the landowner's title"); *United States v. 30.54 Acres of Land, More or Less*, 90 F.3d 790, 792 (3rd Cir. 1996) (holding that because a "navigational servitude was a preexisting limitation on the landowners' title to riparian land, . . . the [government's] exercise of the servitude to prohibit the use of the landowners' property was not a taking under the Fifth Amendment"). Because the irrevocable offer was made prior to the time the Property was conveyed to plaintiffs, the taking had already occurred, and they have no standing to challenge it at this point.[41]

E. Statute of Limitations

The Ninth Circuit has utilized the statute of limitations analysis developed in connection with 42 U.S.C. § 1983 claims to determine whether regulatory takings claims are time-barred. See *Levald, supra*, 998 F.2d at 684, 687-88. Thus, an action arising in California prior to 1985 is governed

---

[41] The fact that the County might not have exercised its right to accept the irrevocable offer does not alter the analysis. See *DeAnza Properties X, Ltd. v. County of Santa Cruz*, 936 F.2d 1084, 1087 (9th Cir. 1991). In *DeAnza*, plaintiffs argued that their takings cause of action did not accrue until the county amended a mobile home rent control ordinance to remove the sunset provision with which it was originally enacted. *Id.* at 1086. Discussing its earlier decision in *Hall v. City of Santa Barbara*, 833 F.2d 1270 (9th Cir. 1986), cert. denied, 485 U.S. 940 (1988), the court noted that the city in that case had argued that no takings cause of action had accrued because "the ordinance could be repealed and was not permanent." *Id.* at 1087 (citing *Hall, supra*, 833 F.2d at 1277). The court observed that it had rejected this argument, holding "that the possibility of repeal did not change the nature of the taking," since "the possibility that an action may be repealed or 'undone' does not affect the existence of a taking claim." *Id.* As respects deletion of the sunset provision in the rent control ordinance before it, the *DeAnza* court stated: "The county's amendment in 1987 giving the ordinance an indefinite rather than a definite duration did not create an entirely new cause of action for purposes of the statute of limitations." *Id.*

by a three-year statute of limitations (*Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987)), while the limitations period for a California action accruing after 1985 is one year (*Levald, supra*, 998 F.2d at 688). A Fifth Amendment claim accrues when the taking occurs. *Alliance of Descendants of Texas v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). Even assuming plaintiffs had standing to challenge the constitutionality of the Commission's actions vis-a-vis their predecessors-in-interest, therefore, the action would nonetheless be time-barred, since, measured from the date the purportedly unconstitutional conditions were exacted – 1974 and 1977 – or from the date on which the irrevocable offer was extended in 1987, the statute of limitations expired years before plaintiffs brought this suit.[42]

F. Ripeness Of Plaintiffs' Takings Claim

In *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court established to distinct requirements that must be met before a takings claim is ripe for decision. First, "the government entity charged with implementing the regulations [must have] reached a final decision regarding the application of the regulations to the property at issue." *Id.* at 186. Second, plaintiffs must have sought "compensation through the procedures provided by the State for obtaining such compensation." *Id.* at 195. See also *The San Remo Hotel v. City and County of San Francisco*, 145 F.3d 1095, 1102 (9th Cir. 1998) ("In order to assert an as-applied takings claim, a

---

[42] Plaintiffs and their predecessors-in-interest similarly failed to seek state compensation in a timely fashion. See *Hensler v. City of Glendale*, 8 Cal.4th 1, 22 (1994) ("if the challenge is to the application of the regulation to a specific piece of property, the statute of limitations for initiating a judicial challenge to the administrative action runs from the date of the final adjudicatory administrative decision. Government Code section 66499.37 establishes a 90-day period of limitation for these actions. Thus, there is no uncertainty regarding the commencement of the [statute of limitations] period"), cert. denied, 513 U.S. 1184 (1995).

plaintiff must establish two things: (1) the governmental entity has reached a final decision on the applicability of the regulation to the plaintiff's property; and (2) the plaintiff is unable to receive just compensation from the government"). "Both the final decision and compensation elements must be ripe before the claim is justiciable." *Dodd v. Hood River County*, 59 F.3d 852, 858 (9th Cir. 1995).

It is the second prong of this test that is at issue in this case, i.e., that a "takings claim . . . is unripe until the owner has sought, and been denied, just compensation by the state." *The San Remo Hotel, supra*, 145 F.3d at 1101 (citing *Sinclair Oil Corp. v. County of Santa Barbara*, 98 F.3d 401, 406 (9th Cir. 1996), cert. denied, 118 S.Ct. 1386 (1998), and *Levald, supra*, 998 F.2d at 686). This requirement is rooted in the text of the Constitution, for "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson, supra*, 473 U.S. at 194. "So long as the state provides 'an adequate process for obtaining compensation,' no constitutional violation can occur" until just compensation is denied. *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1402 (9th Cir. 1989) (quoting *Williamson*, 473 U.S. at 194-95), cert. denied, 494 U.S. 1016 (1990), overruled on other grounds in *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). Thus, a plaintiff cannot bring a takings action until the state denies just compensation because the cause of action does not accrue until that point. See *Williamson, supra*, 473 U.S. at 196 ("a property owner has not suffered a violation of the Just Compensation Clause until the owner has unsuccessfully attempted to obtain just compensation through the procedures provided by the State of obtaining such compensation"); *Miller v. Campbell County*, 945 F.2d 348, 352 (10th Cir. 1991) (takings claim not ripe where plaintiffs had not "been turned away empty-handed" at the state level), cert. denied, 502 U.S. 1096 (1991).

A review of the procedural history in *Nollan* discloses what Johnson or the Bucklews should have done to preserve a claim – when the permit condition was exacted, or the recording of the irrevocable offer to dedicate was demanded, they should have exhausted their administrative remedies before the Coastal Commission and thereafter filed a petition for writ of mandate in the Superior Court. See *Nollan, supra*, 483 U.S. at 829; see also *Jama Const. v. City of Los Angeles*, 938 F.2d 1045, 1047-48 (9th Cir. 1991) (takings claim dismissed as unripe where plaintiff "did not seek compensation through California procedures before bringing its federal action"), cert. denied, 503 U.S. 919 (1992). Similarly, even if the Board of Supervisors' resolution accepting the irrevocable offer constituted a new or different taking, plaintiffs do not allege that they initiated administrative or state judicial proceedings to obtain just compensation. In fact, they disavow any interest in pursuing compensation damages in this suit. Thus, even if they had standing and their claim was timely, it would not be ripe and thus not justiciable.

G. Pendent State Claims

In addition to their single federal claim, plaintiffs have alleged three pendent state claims – a taking under the California Constitution, quiet title, and violations of CEQA. When the court has dismissed all claims over which it has original jurisdiction, it may, in its discretion, decline to exercise supplemental jurisdiction over the remaining state law claims. 28 U.S.C. § 1367(c)(3). See *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 350, n. 7 (1988); *Gini v. Las Vegas Metropolitan Police Dept.*, 40 F.3d 1041, 1046 (9th Cir. 1994) ("'[i]n the usual case in which federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state law claims'"); *Schneider v. TRW, Inc.*, 938 F.2d 986, 992-93 (9th Cir. 1991) (holding that the district court has discretion to dismiss state law claims after

dismissing all federal claims on summary judgment); *Schultz v. Sundberg*, 759 F.2d 714, 718 (9th Cir. 1985) ("Generally, dismissal of federal claims before trial dictates that the pendent state claims should also be dismissed"); *Wren v. Sletten Const. Co.*, 654 F.2d 529, 536 (9th Cir. 1981) ("When the state issues apparently predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim").

Here, the court has determined that the County is entitled to dismissal of the only federal claim alleged in plaintiffs' complaint. Accordingly, it declines to exercise supplemental jurisdiction over the remaining state law claims. Because jurisdiction in this case was premised on the existence of a federal question, and because the court has dismissed that claim, plaintiffs' claims for quiet title, taking under the California Constitution and CEQA violations are dismissed without prejudice.

III. CONCLUSION

Since the court has determined that plaintiffs have no standing to assert a Fifth Amendment takings claim, that such claim is barred by the statute of limitations, and that the claim is not ripe, the court assumes that plaintiffs cannot amend to cure the deficiencies that presently exist in the pleading. For this reason, the County's motion to dismiss is granted without leave to amend.

Dated: October 6, 1999

/s/ Margaret M. Morrow
MARGARET M. MORROW
UNITED STATES DISTRICT JUDGE

NOV 22 2000

(9)

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

**On Writ Of Certiorari To
The Supreme Court Of Rhode Island**

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

NANCIE G. MARZULLA
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., N.W., Suite 410
Washington, DC 20036
202-822-6770

Counsel of Record for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

31 PM

QUESTION PRESENTED

Amicus curiae will address the following question:

Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT 2

ARGUMENT 6

I. THE FACT THAT THERE ARE REGULATIONS THAT REQUIRE A PROPERTY OWNER TO OBTAIN A PERMIT PRIOR TO USING HIS LAND DOES NOT MEAN, AS A MATTER OF LAW, THAT THE GOVERNMENT'S REFUSAL TO ISSUE A PERMIT IS NOT A TAKING UNDER THE FIFTH AMENDMENT 6

A. The Mere Existence of a Regulatory Regime Does Not Entitle the Government To Take All Economically Beneficial Use of Land without Payment of Just Compensation ... 6

B. The Mere Existence of a "Regulatory Climate" Does Not Dispose of the Takings Issue in a Partial Takings Case 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 8

Armstrong v. United States, 364 U.S. 40 (1960) 11

Bennett v. Spear, 520 U.S. 154 (1997) 1

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 2, 15

Creppel v. United States, 41 F.3d 627 (Fed. Cir. 1994) 4

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1, 14

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 14

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) 9

Fuller v. United States, 409 U.S. 488 (1973) 12

Good v. United States, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000) 4, 5, 6, 7, 16

Hodel v. Irving, 481 U.S. 704 (1987) 17

Keene Corp. v. United States, 508 U.S. 200 (1993) 1

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994) 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

Maritrans, Inc. v. United States, 40 Fed. Cl. 790 (1998) 13

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 14, 15

TABLE OF AUTHORITIES – Continued

Page

Palazzolo v. Coastal Resources Management Council, C.A. No. 86-1496, 1995 WL 941370 (R.I. Super. Jan. 5, 1995) 3

Palazzolo v. Coastal Resources Management Council, No. 88-0297 (R.I. Super. Oct. 24, 1997) 3

Palazzolo v. Rhode Island, 746 A.2d 707 (R.I. 2000), *cert. granted*, 121 S. Ct. 296 (2000).. 2, 3, 4, 10, 13, 16

Palm Beach Isles Assoc. v. United States, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on rehearing*, No. 99-5030, 2000 WL 1665135 (Fed. Cir. Nov. 3, 2000), *and rehearing en banc denied*, No. 99-5030, 2000 WL 1693725 (Fed. Cir. Nov. 13, 2000) 5, 6, 16, 17

Palm Beach Isles Assocs. v. United States, No. 99-5030, 2000 WL 1665135 (Fed. Cir. Nov. 3, 2000) 7, 8, 9

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 10

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 2, 3, 5, 7, 16

Phillips v. Washington Legal Found., 524 U.S. 156 (1998) 1, 17

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000) 2

Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) 1

TABLE OF AUTHORITIES – Continued

Page

United States v. Riverside Bayview Homes, Inc., 474 U.S. 12 (1985) 12

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 12

CONSTITUTIONS

U.S. CONST. amend. V 3, 11, 12

STATUTES

Water Pollution Prevention and Control Act, 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 2000) 17, 18

OTHER AUTHORITIES

<http://www.epa.gov/owow/wetlands/facts/fact18.html> 18

<http://www.epa.gov/owow/wetlands/facts/fact5.html> 18, 19

James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)) 11

Michael Grunwald, *For Oil Projects, Corps' Answer Is Almost Always "Yes"*, THE WASHINGTON POST (Sept. 13, 2000) 19

Michael Grunwald, *Working to Please Hill Commanders*, THE WASHINGTON POST (Sept. 11, 2000) 17

U.S. Army Corps of Engineers, Regulatory Branch, Section 404 and Section 10/404 Permit Activities 18

BRIEF *AMICUS CURIAE* OF DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

Pursuant to Rule 37.3 of the Rules of this Court, *amicus curiae* submits this brief in support of petitioner.[1] Both parties have consented to the filing of this brief.

INTERESTS OF *AMICUS CURIAE*

Defenders of Property Rights is the only national legal defense foundation dedicated exclusively to protecting private property rights. Based in Washington, D.C., Defenders was founded as a non-profit, public interest legal foundation in 1991. Its mission is to protect vigorously those rights considered essential by the Framers of the Constitution, and to promote a better understanding of the relationship between private property rights and individual liberty. Defenders of Property Rights engages in litigation across the country on behalf of its members and the public interest to prevent government incursion into protections guaranteed by the Bill of Rights. Defenders participated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Keene Corp. v. United States*, 508 U.S. 200 (1993); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Bennett v. Spear*, 520 U.S. 154 (1997); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998);

---

[1] No counsel for either party authored this brief *amicus curiae*, either in whole or in part. Furthermore, nor persons other than *amicus curiae* contributed financially to the preparation of this brief.

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999); and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845 (7th Cir. 1999), *cert. granted*, 120 S. Ct. 2003 (2000), when they were before this Court.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

On the back of the rather unexceptional facts of this case, the government seeks to establish a rule of law that would in one fell swoop undo this Court's venerable regulatory takings jurisprudence. The court below, purporting to benignly interpret and apply this Court's holdings in the landmark cases of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), rendered a decision that directly contravenes those decisions and which, if not reversed by this Court, eviscerates the Just Compensation Clause. *See Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I. 2000), *cert. granted*, 121 S. Ct. 296 (2000) (Pet. App. at A-1).

The relevant facts of this case can be summarized as follows. In 1978, petitioner acquired a parcel of land that was subject to the Rhode Island Inter-Tidal Wetlands Protection Act, which regulates the filling of wetlands in coastal wetlands. *Palazzolo*, 746 A.2d at 710, 715 (Pet. App. at A-1). In 1985, petitioner filed for a permit allowing him to fill 18 acres of his land in order to develop a recreational beach facility. *Id.* at 711 (Pet. App. at A-1).

Without a wetland fill permit, he can make no economically beneficial use of his land. Petition for Writ of Certiorari at 18, *Palazzolo v. Rhode Island*, 746 A.2d 707 (R.I. 2000). Nevertheless, in 1986, respondent, the Coastal Resources Management Council ("CRMC") denied petitioner's permit application, whereupon petitioner sought an administrative appeal, which was also denied, and filed suit in state court seeking just compensation for the taking of his property rights in violation of the Fifth Amendment. *Palazzolo*, 746 A.2d at 711 (Pet. App. at A-1) (citing *Palazzolo v. Coastal Resources Management Council*, C.A. No. 86-1496, 1995 WL 941370 (R.I. Super. Jan. 5, 1995) (Pet. App. at A-31)).

In 1997, the state trial court rejected petitioner's claim for just compensation for the taking of his property rights in violation of the Fifth Amendment. *Id.* (Pet. App. at A-1) (citing *Palazzolo v. Coastal Resources Management Council*, No. 88-0297 (R.I. Super. Oct. 24, 1997) (Pet. App. at B-1)). The Supreme Court of Rhode Island affirmed, holding that petitioner could not prevail under the *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *per se* takings test because "a regulatory takings claim may not be maintained where the regulation predates the acquisition of the property." *Palazzolo*, 746 A.2d at 715-17 (Pet. App. at A-1). The court below further held that petitioner could not establish a partial taking under the *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), test because a property owner, as a matter of law, lacks "reasonable investment-backed expectations" whenever the regulation predates the acquisition of the property. *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1).

The court below's confusion over the proper role of investment-backed expectations in the context of a categorical regulatory taking case derives from a recent decision of the U.S. Court of Appeals for the Federal Circuit, *Good v. United States*, 189 F.3d 1355, 1361-62 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000). In *Good*, the court held that:

> For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him. The requirement of investment-backed expectations "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." . . . *Lucas* did not mean to eliminate the requirement for reasonable, investment-backed expectations to establish a taking.

Id. at 1360-61 (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994); citing *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171 (Fed. Cir. 1994)).

Parroting *Good*, the court below likewise held that in this case the petitioner "could not reasonably have expected" that he could develop his land because the mere existence of a regulatory scheme in place at the time he acquired the land barred recovery. This was not a factual conclusion reached as a result of an ad hoc factual inquiry, but rather was a conclusion of law reached because of the existence of the regulatory scheme. *Palazzolo*, 746 A.2d at 717 (citing *Good*, 189 F.3d at 1361-62) (Pet. App. at A-1).

Moreover, the court below further compounded that error by holding that investment-backed expectations were dispositive of both the categorical and partial takings issues: "Palazzolo's lack of reasonable investment-backed expectations is dispositive in this case, and we need not consider the other factors of the *Penn Central* test." *Id.* (citing *Good*, 189 F.3d at 1363).

The case on which the court below relied, *Good v. United States*, has since been severely limited by the Court of Appeals for the Federal Circuit, destroying the underpinnings of the decision below. *See Palm Beach Isles Assoc. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on rehearing*, No. 99-5030, 2000 WL 1665135 (Fed. Cir. Nov. 3, 2000), *and rehearing en banc denied*, No. 99-5030, 2000 WL 1693725 at *3 (Fed. Cir. Nov. 13, 2000) (Gajarsa, J., dissenting) ("The panel holds that in a categorical regulatory taking, a property owner is entitled to recovery 'without regard to consideration of investment-backed expectations.' ")

As the Federal Circuit did in *Palm Beach Isles*, *amicus curiae* urges this Court to reverse the court below's misreading of this Court's decisions in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Otherwise, a holding that the mere existence of a regulatory regime is an absolute bar to a regulatory taking claim will swallow the Just Compensation Clause since there is virtually no piece of virgin land or property in this country not subject to extensive government regulation and oversight.

ARGUMENT

I. THE FACT THAT THERE ARE REGULATIONS THAT REQUIRE A PROPERTY OWNER TO OBTAIN A PERMIT PRIOR TO USING HIS LAND DOES NOT MEAN, AS A MATTER OF LAW, THAT THE GOVERNMENT'S REFUSAL TO ISSUE A PERMIT IS NOT A TAKING UNDER THE FIFTH AMENDMENT.

A. The Mere Existence of a Regulatory Regime Does Not Entitle the Government To Take All Economically Beneficial Use of Land without Payment of Just Compensation.

In *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), *aff'd on rehearing*, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000), the Federal Circuit rejected the government's argument that investment-backed expectations should be part of a categorical takings analysis. The government sought rehearing on that issue, arguing that the holding was inconsistent with the Federal Circuit decision in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), which, the government argued, held that " 'reasonable investment-backed expectations are elements of every regulatory takings case' even if all economically viable use of the property has been denied." Petition for Rehearing and Petition for Rehearing En Banc at 3, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374 (Fed. Cir. 2000) (quoting *Good*, 189 F.3d at 1361).

In its decision on rehearing in *Palm Beach Isles*, the Federal Circuit made plain that *Good* did not hold that expectations are part of every regulatory takings case,

explaining that *Good* itself did not involve a categorical takings analysis under *Lucas*, a limited class of cases[2]:

> For our purposes, the single most important fact in the [Good] case is that the case did not involve a categorical taking. The trial court expressly found that "[c]ontrary to plaintiff's contention, the ESA [Endangered Species Act, on which the final permit denial by the Corps of Engineers was based] does not require that his property be left in its natural state."[3]

Palm Beach Isles Assocs. v. United States, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000) (quoting *Good v. United States*, 39 Fed. Cl. 81, 84 (1997)).

In *Palm Beach Isles*, the Federal Circuit also explained why expectations should play no role in a categorical takings analysis:

> A purchaser who pays a substantial price for a parcel can be assumed to have expectations that the parcel can be used for some lawful purpose. When government seizes the entire estate for

---

[2] Of course, investment-backed expectations remain an appropriate element of analysis in partial takings cases such as *Good* or *Penn Central*, but this is not such a case; rather, it is a categorical takings case by government in *Lucas*, not *Penn Central* or *Good*.

[3] The Federal Circuit also stated: "Further, the U.S. Fish and Wildlife Service (FWS) restrictions on development imposed pursuant to the ESA do not deprive plaintiff's property of all economic value. The property retains value both for development or for the sale of transferable development rights." *Palm Beach Isles Assocs. v. United States*, No. 99-5030, 2000 WL 1665135 at *6 (Fed. Cir. Nov. 3, 2000) (quoting *Good v. United States*, 39 Fed. Cl. 81, 84 (1997)).

> government purposes, whether by physical occupation or categorical regulatory taking, it is not necessary to explore what those expectations may have been. The purchaser may have had no particular expectations regarding immediate use, but only purchased for long-term investment. Or the purchaser's expectations may have been wholly unrealistic, and she may have paid more than the property is worth. It matters not. The Government is not obligated to pay for her expectations, but only to pay for the property interest taken.

Palm Beach Isles, 2000 WL 1665135 at *9.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court established a bright line test for the narrow class of categorical takings, where the owner was deprived of all economically beneficial use. Drawing upon *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), which stated in dictum that if a zoning ordinance denies the property owner all "economically viable use" of his property then an unconstitutional taking has occurred, the *Lucas* Court plainly did not include investment-backed expectations as part of the categorical takings analysis:[4]

[4] Some have suggested that the categorical rule of *Lucas* might induce a speculative investment in property the purchaser knows cannot be used. *Palm Beach Isles Assocs. v. United States*, No. 99-5030, 2000 WL 1693725 at *6 (Fed. Cir. Nov. 13, 2000) (Gajarsa, J., dissenting). However, if the property had no use at the time of purchase, government action could not cause the loss (or take) of use. Thus, the Just Compensation Clause would not be implemented in the first instance.

> Had the court intended to make analysis of a categorical regulatory taking different from the categorical physical taking, for example regarding the question of investment-backed expectations, surely somewhere in the opinion there would be a hint of it. There is not. The Court well understood that, in takings law involving a "physical" taking of land by the government, the reason the owner acquired the land in the first instance is of no concern that is, the owner's investment-backed expectations, or lack of them, are not a consideration. In light of the Court's repeated juxtaposition of physical takings with "categorical" regulatory takings, and the Court's repeated unqualified statements that the latter deserve the same compensation without more, we can only conclude that the Court's purpose was to convey that principle that, when there is a physical taking of land, or a regulatory taking that constitutes a total wipeout, investment-backed expectations play no role.

Palm Beach Isles, 2000 WL 1665135 at *8; *see also Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1564-65 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) ("The recent Supreme Court decision in *Lucas* . . . teaches that [i]f a regulation categorically prohibits all economically beneficial use of land destroying its economic value for private ownership the regulation has an effect equivalent to a permanent physical occupation. There is, without more, a compensable taking.")

The *Lucas* Court's takings analysis was explicitly grounded on stable "background principles" of property law:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. . . . We believe similar treatment must be accorded confiscatory regulations, i.e., regulations that prohibit all economically beneficial use land: Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership.

Lucas, 505 U.S. at 1027, 1029.

The court below erroneously interpreted "background principles of State's law of property" to mean "the regulatory climate that existed when [the landowner] acquired the subject property. . . ." *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1)). However, this Court actually was referring to the traditional real property law of titles and regulatory schemes that affect use, but generally do not result in a categorical takings. *See Lucas*, 505 U.S. at 1029-31. In so doing, the court below destroyed the delicate balance described so eloquently by Justice Holmes: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The holding below effectively states that all existing regulatory schemes are conclusively presumed to "go too far" as a matter of law, and that the owner has no

remedy under the Constitution because of this "expectation."

However, the right to own and enjoy one's property is one of the fundamental rights on which our system of law is based and is a potent component of the background principles of the States' laws of property. James Madison wrote: "[A]s a man is said to have a right to his property, he may be equally said to have a property in his rights." James Madison, *Property*, 1 NAT'L GAZETTE 174 (1792) (reprinted in 4 LETTERS AND OTHER WRITINGS OF JAMES MADISON 480 (1865)). These rights, and more particularly property rights, derive from equitable concepts rooted in common law and in the principles of equity that are reflected in the Just Compensation Clause of the Fifth Amendment. In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Court explicitly recognized that the Just Compensation Clause helps define a property owner's understanding of his or her rights in property:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.

Id. at 1028 (emphasis supplied).

The historical compact recorded in the Just Compensation Clause is in essence an understanding that government's power will be constrained by principles of fairness. *Armstrong v. United States*, 364 U.S 40 (1960). While a government can, under certain circumstances,

"take" private property for public use, any such taking is void unless it provides for fair payment in return. U.S. CONST. amend. V; *see also Fuller v. United States*, 409 U.S. 488, 490 (1973) (citation omitted) ("The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness as it does from technical concepts of property law.").

In this case, the mere existence of a regulatory permitting scheme in place at the time petitioner acquired land neither outright eliminated his ability to use his land nor negated the background principals of property law and the right to just compensation for a taking that is part of every property owner's property estate. Rather, the regulations in place simply required that he obtain a permit to use his land. As this Court has repeatedly held, "mere assertion" of regulatory authority over a parcel of property does not affect an owner's rights under the Just Compensation Clause. *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127 (1985). Moreover, until petitioner applied for and was denied a permit to fill his wetland, his claim for just compensation was not ripe for judicial review. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). *A fortiori*, since petitioner's right to use property was not taken until he was denied a permit, the mere existence of the permitting requirement did not destroy his expectations with respect to use of his property.

Indeed, if the mere existence of regulations affecting the use of land destroyed all right to just compensation under the Fifth Amendment, then this Court would not have been able to state as it did in 1992 that it is an

"extraordinary circumstance when no productive or economically beneficial use of land is permitted. . . ." *Lucas*, 505 U.S. at 1017. In 1992, when this statement was made, there were literally hundreds of thousands of regulations affecting the use of privately owned land in this country that, under the court below's view, would have destroyed any landowner's hope of ever being compensated for the taking of his property rights. Indeed, the government made the argument in the *Lucas* case, and which this Court specifically rejected, that the "regulatory climate" was such that David Lucas should have foreseen the enactment of the Beachfront Management Act pursuant to which he was denied a permit to build his two proposed houses. *Id.* at 1028 ("[W]e think that the notion pressed by the Council that title is somehow held subject to the "implied limitation" that the state may subsequently eliminate all economically viable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.").

Finally, the court below made much of the fact that "[petitioner] was unable to cite a single case in which a court has ordered compensation for a regulatory taking when the claimant became the owner of the property *after* the regulation became effective." *Palazzolo*, 746 A.2d at 716 (Pet. App. at A-1) (emphasis in original). However, there are numerous decisions where courts have held that the existence of even a strict regulatory regime concerning the use of private property does not preclude a court from finding that a property owner reasonably expects to exercise the right to use its property. For example, in *Maritrans, Inc. v. United States*, 40 Fed. Cl. 790, 790-92 (1998), the owner of a fleet of oil barges sought just

compensation because of a regulation requiring transformation of its single-hulled vessels into double-hulled vessels. The government argued that the plaintiff had no reasonable investment-backed expectations regarding the use of its ships because the maritime industry is pervasively or heavily regulated. *Id.* at 794. The court pointed out that there are several industries subject to heavy regulation, such as the banking industry, in which takings claims have been considered, but held that "we are not aware of a blanket no-takings rule with respect to regulated industries; or that one may never prevail on a takings claim if participating in a heavily regulated industry." *Id.* at 797. Moreover, the court specifically rejected the government's argument, stating that "[m]ere participation in a regulated industry does not preclude a finding that a compensable taking has occurred." *Id.* at 801.

Indeed, land use is the quintessential "heavily regulated industry" because zoning has been in effect in most cities for many decades. Yet this Court has never suggested that the mere existence of a zoning regulatory scheme is an absolute bar to a taking claim. To the contrary, in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), a coastal zoning permitting scheme was in place when the Nollans decided to replace their beachfront home. Furthermore, in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), floodplain zoning was in place when the First English Church was denied the right temporarily to rebuild. Similarly, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), a building permit requirement was in place when Florence Dolan was denied a permit that she later

claimed was an unconstitutional exaction. Finally, zoning and subdivision requirements were in place when a property owner was denied a permit in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999). In none of these cases did this Court even suggest that the mere existence of zoning laws defeated a takings claim. Nor did the Court consider whether the zoning scheme (as compared with the particular permit condition or land use limitation) was or was not in effect at the time of purchase. Indeed, in *Nollan*, this Court explicitly rejected this argument:

> Nor are the Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Nollan, 483 U.S. at 833-34 n.2.

Similarly, the petitioner in this case reasonably expected that he would be able to use his property to construct a residential development despite the existence of the Rhode Island Inter-Tidal Wetlands Protection Act. The mere fact that the property's use was regulated does not preclude a finding that a compensable taking has occurred.

B. The Mere Existence of a "Regulatory Climate" Does Not Dispose of the Takings Issue in a Partial Takings Case.

Citing the Federal Circuit's decision in *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 1554 (2000), the court below also rejected petitioner's partial taking claim for relief on the ground that petitioner's expectation that he could use his property was unreasonable as a matter of law because "there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development." *Palazzolo*, 746 A.2d at 717 (Pet. App. at A-1). The court below further misapplied the rule of *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978), which requires that a court "engag[e] in . . . essentially ad hoc factual inquiries." The Court in *Penn Central* identified three factors commonly considered in the course of these ad hoc inquiries: "[t]he economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations [and] . . . the character of the governmental action." *Id.* (citations omitted). This Court has never held, nor should it, that a "reasonable expectations" factor eliminates the need to examine the facts of the particular case, and can serve as an absolute bar to a partial takings claim.

Moreover, the Federal Circuit Court of Appeals in *Palm Beach Isles* has rejected the court below's erroneous reading of *Good* on this issue of partial takings:

> The existence of a regulatory regime does not per se preclude all investment-backed expectations for development. The difficulty with the third point is that it involves a disputed question of fact – what uses are left for the tract after the permit denial – and the case was decided on summary judgment.

Palm Beach Isles, 2000 WL 1665135 at *11; *see also Hodel v. Irving*, 481 U.S. 704 (1987) (finding taking of right to devise unconstitutional even though potential heirs certainly had no particular expectation regarding inheritance); *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), (holding the owner of the principal entitled to just compensation for the taking of his interest even though he had no expectation that he would ever earn any interest on his money).

Indeed, even if petitioner in this case, as a matter of fact, could not establish that his expectations were reasonable with respect to use of his property, there is no basis whatsoever for this Court establishing that, as a matter of law, no property owner can have reasonable expectations to use his or her property if there is a regulatory regime in place. For example, since 1972, there has been a federal wetlands regulatory regime in effect for the entire United States, affecting millions of landowners and many millions of acres of private land. *See* Water Pollution Prevention and Control Act, 33 U.S.C.A. §§ 1251-1387 (1986 & Supp. 2000); *see also* Michael Grunwald, *Working to Please Hill Commanders*, THE WASHINGTON POST at A1 (Sept. 11, 2000) ("The [Corps] controls 12,000 miles of waterways, 8,500 miles of levees, 4,400 recreation sites, 300 deep-draft ports everyone in someone's district, someone's state."). Under the federal wetlands regulatory program, land deemed jurisdictional wetland cannot be filled (that is to say, used by the property owner) without

a Section 404 wetland permit. 33 U.S.C. § 1344 (1986 & Supp. 2000). However, the mere fact that a property owner must obtain a permit does not mean he or she has no expectations that the property cannot be used, since more than 95% of all Section 404 permits applications are granted each year. *See* <http://www.epa.gov/owow/wetlands/facts/fact18.html> (attached as Exhibit A).

Not only does the mere enactment of a regulatory regime not preclude a finding that a property owner can reasonably expect to use his land, but the administration of the regulatory regime may even contribute to the property owner's expectations. For example, information from the U.S. Army Corps of Engineers' Regulatory Branch in Washington, D.C. indicates that, from fiscal year 1994 to 1998, of the 44,249 Section 404 individual permit applications the Corps of Engineers received, only 1,186 were denied. *See* U.S. Army Corps of Engineers, Regulatory Branch, Section 404 and Section 10/404 Permit Activities (hereinafter "Corps Permit Activities Table") (attached as Exhibit B); *see also* <http://www.epa.gov/owow/wetlands/facts/fact5.html> (attached as Exhibit C). Those statistics evidence a Corps permitting trend that can be traced back at least as far as 1980. Between fiscal years 1980 and 1985, approximately 43,750 of the 55,565 individual permit applications received were approved and only 1,945 were denied. *See* Corps Permit Activities Table (attached as Exhibit B). Moreover, the U.S. Army Corps of Engineers statistics indicate that only 2,340 of the 54,900 individual permit applications received between fiscal years 1985 and 1990 were denied. *Id.* Remarkably, the Environmental Protection Agency has vetoed only eleven permit application approvals in the entire history of the

Corps of Engineers' administration of the permit program. *See* <http://www.epa.gov/owow/wetlands/facts/fact5.html> (attached as Exhibit C). It has been reported that even last year the Corps "denied less than half as many applications to fill wetlands as it did in 1992." *See* Michael Grunwald, *For Oil Projects, Corps' Answer Is Almost Always "Yes"*, THE WASHINGTON POST at A1 (Sept. 13, 2000) ("A review of the [Corps'] work in Alaska and around the country shows that its $117 million regulatory program is mostly just a permitting program, allowing well over 99 percent of developers' requests to drain, dredge and fill wetlands . . . ").

In light of these statistics regarding just one federal program, a constitutional holding that a property owner cannot reasonably expect to use his or her land simply because it is subject to a permitting scheme is unwarranted.

CONCLUSION

For all of the foregoing reasons, *amicus curiae* urges this Court to reverse the decision below.

Respectfully submitted,
NANCIE G. MARZULLA
DEFENDERS OF PROPERTY RIGHTS
1350 Connecticut Ave., N.W., Suite 410
Washington, D.C. 20036
202-822-6770

Counsel for Amicus Curiae

Dated: November 22, 2000

U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1985	1986	1987	1988	1989	1990
Individual Permit Applications Received[1]	8,400	8700	8600	11,100	8600	9500
Individual Permits Issued[2]	5,200	5800	5200	5200	5000	4800
Individual Permits Denied	365	385	390	380	380	440
Individual Permits Withdrawn	1,700	1990	2300	4800	3800	4000
General Permits Authorized	139,600	119,500	133,100	2600	28400	30300

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1994	1995	1996	1997	1998
Individual Permit Applications Received[1]	9080	8923	9115	8095	9036
Individual Permits Issued[2]	4134	4693	5028	4755	4931
Individual Permits Denied	358	284	219	167	158
Individual Permits Withdrawn	4184	5093	4117	4100	3841
General Permits Authorized	39619	51672	55268	60219	64520

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. ARMY CORPS OF ENGINEERS
REGULATORY BRANCH
SECTION 404 AND 10/404
PERMIT ACTIVITIES

Section 404 and Sections 10/404	1980	1981	1982	1983	1984	1985
Individual Permit Applications Received[1]	10,000	11,000	9,600	8,435	8,130	8,400
Individual Permits Issued[2]	8,000	8,550	9,000	7,000	6,000	5,200
Individual Permits Denied	250	290	320	370	350	365
Individual Permits Withdrawn	1,800	1,500	2,000	1,900	1,400	1,700
General Permits Authorized	17,000	20,500	54,000	85,000	92,400	139,600

[1]Applications received during the fiscal year.
[2]Includes Letter Permits

U.S. Environmental Protection Agency

What About Takings?

The Issue: When does a government action affecting private property amount to a "taking," and what are the takings implications of wetland regulation?

The Fifth Amendment to the Constitution of the United States of America

No person shall . . . be deprived of . . . property without due process of law, nor shall private property be taken for public use, without just compensation.

Legal Background

The concept of takings comes from the Fifth Amendment (see box below), which prohibits the taking of private property by the government for a public use without payment of just compensation. This fact sheet briefly explores the issue of takings as it relates to wetlands regulation.

The Supreme Court and lower courts have established a body of law used to determine when government actions affecting use of private property amount to a "taking" of the property by the government. When private property is "taken" by the government, the property owner must be fairly compensated.

Initially, the courts recognized takings claims based on government actions that resulted in a physical seizure or occupation of private property. The courts subsequently ruled that, in certain limited circumstances, government regulation affecting private property also may amount to a taking.

In reviewing these "regulatory" takings cases, the courts generally apply a balancing test; they examine the character of the government's action and its effect on the property's economic value. Government actions for the purpose of protecting public health and safety, including many types of actions for environmental protection, generally will not constitute takings. The courts also look at the extent to which the government's action interferes with the reasonable, investment-backed expectations of the property owner.

In Lucas v. South Carolina Coastal Council (1992), the U.S. Supreme Court ruled that a State regulation that deprives a property owner of all economically beneficial use of that property can be a taking. The court further clarified, however, that a regulation is not a taking if it is consistent with "restrictions that background principles of the State's law of property and nuisance already placed upon ownership." As an example of "background principles," the court referred to the right of government to prevent flooding of others' property.

Dolan v. City of Tigard (1994), a more recent Supreme Court takings case, involved a requirement by the City of Tigard in Oregon that, to prevent flooding and traffic congestion, a business owner seeking to expand substantially onto property adjacent to a floodplain create a

public greenway and bike path from private land. The Supreme Court ruled that the City's requirement would be a taking if the City did not show that there was a Areasonable relationship@ between the creation of the greenway and bike path and the impact of the development. As compared to the facts in Dolan, the Clean Water Act Section 404 program generally does not require property owners to provide public access across or along their property.

Current Status

The presence of wetlands does not mean that a property owner cannot undertake any activity on the property. In fact, wetlands regulation under Section 404 does not necessarily even result in restricting the use of a site. Many activities are either not regulated at all, explicitly exempted from regulation, or authorized under general permits.

Moreover, in situations where individual permits are required, the Federal agencies can work with permit applicants to design projects that meet the requirements of the law and protect the environment and public safety, while accomplishing the legitimate individual objectives and protecting the property rights of the applicant. Overall, more than 95% of all projects receive Section 404 authorization.

Wetlands Division homepage

Additional Questions? Call our Wetlands Hotline at 1-800-832-7828 or send e-mail to wetlands.hotline@epamail.epa.gov.

OWOW HOMEPAGE | EPA HOME | SEARCH | COMMENTS | WHAT'S NEW

Environmental Protection Agency's Office of Wetlands, Oceans, Watersheds

URL: http://www.epa.gov/owow/wetlands/facts/fact18.html

Revised May 25, 1999

U.S. Environmental Protection Agency

Facts about Wetlands

Over half (53) of the wetlands in the lower 48 States were lost between the late 1700s and the mid-1980s. About 100 million acres of wetlands remain today in the lower 48 States, representing less than 5% of the land mass in the continental United States.(See map.)

Source:Dahl and Johnson. Status and Trends of Wetlands in the Conterminous United States. USFWS, 1989.

Twenty-two States have lost at least 50% of their original wetlands. Seven of those twenty-two States – California, Illinois, Indiana, Iowa, Missouri, Kentucky, and Ohio – have lost more than 80% of their original wetlands. Source: Mitch and Gosselink. Wetlands. 2nd edition. Van Nostrand Reinhold, 1993.

BEST AVAILABLE COPY

From the mid-1970s to the mid-1980s, wetlands were lost at an annual rate of 290,000 acres per year. Source: Dahl and Johnson. Status and Trends of Wetlands in the Conterminous United States, mid-1970's to mid-1980's. USFWS, 1991.

In Fiscal Year 1994, over 48,000 people applied to the Army Corps of Engineers (Corps) for a Section 404 permit. Eighty-two percent of these applications were covered by general permits in an average time of 16 days. Less than ten percent of the applications were subject to the more detailed individual evaluation – which took an average of 127 days. Only 358, or 0.7 percent, of the permits were denied. In the 22-year history of the Section 404 program, EPA has vetoed only 11 permits.

In short, almost all individuals who applied for a Section 404 permit in 1994 got their permits, and the average time for a decision was 27 days.

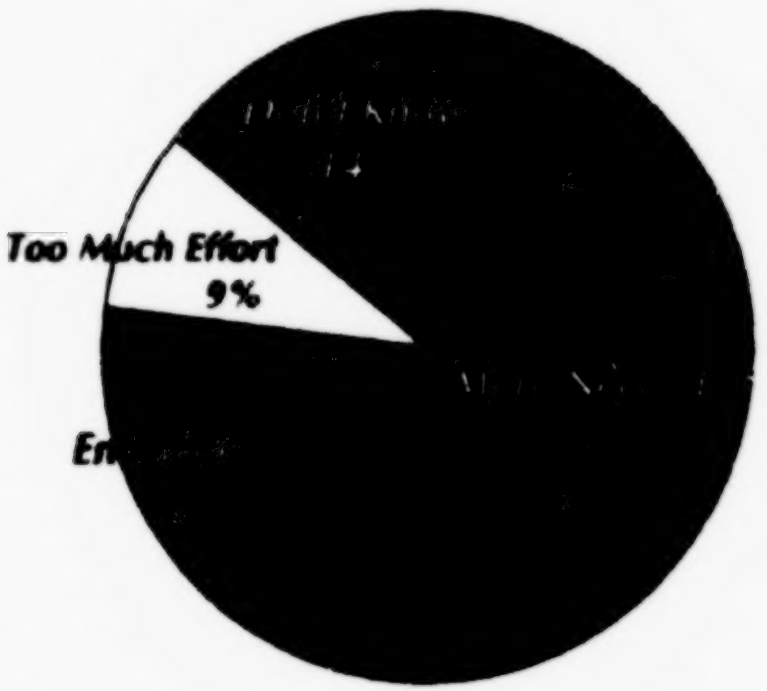
In addition, general permits cover an estimated 50,000 activities that do not require the public to notify the Corps at all.

Source: U.S. Army Corps of Engineers, U.S. Environmental Protection Agency.

Is Current Wetlands Protection Adequate?

In a 1994 survey, 53% of the respondents said they felt that more wetlands protection efforts were needed, 24% said current efforts struck the right balance, 9% said these efforts had gone too far, and 14% said they didn't know.

Source: "Times Mirror Magazines National Environmental Forum Survey." 1994. Times Mirror Magazines/Roper Starch.



Wetlands Division homepage

Additional Questions? Call our Wetlands Hotline at 1-800-832-7828 or send e-mail to **wetlands.hotline@epamail.epa.gov.**

OWOW HOMEPAGE | EPA HOME | SEARCH | COMMENTS | WHAT'S NEW

Environmental Protection Agency's Office of Wetlands, Oceans, Watersheds

BEST AVAILABLE COPY

URL: http://www.epa.gov/owow/wetlands/facts/fact5.html

Revised May 25, 1999

NOV 22 2000

(10)

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL
Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF *AMICI CURIAE* OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONER

DANIEL J. POPEO
R. SHAWN GUNNARSON
Counsel of Record
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 588-0302
Counsel for Amici Curiae

November 22, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

31 pp

QUESTION PRESENTED

Amici Curiae will address only the following question presented:

Whether a regulatory takings claim is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	2
I. INQUIRING INTO AN OWNER'S "REASONABLE INVESTMENT BACKED EXPECTATIONS" HAS BRED UNCERTAINTY, INCOHERENCE, AND UNFAIRNESS IN REGULATORY TAKINGS DECISIONS	3
II. THE PHRASE "REASONABLE INVESTMENT BACKED EXPECTATIONS" BEARS NO CLOSE RELATION TO THE LANGUAGE OF THE FIFTH AMENDMENT TAKINGS CLAUSE	19
III. WITH THREE EXCEPTIONS "INVESTMENT-BACKED EXPECTATIONS" OUGHT TO BE ABANDONED AS A FACTOR IN REGULATORY TAKINGS CASES	22
IV. MR. PALAZZOLO'S "REASONABLE INVESTMENT BACKED EXPECTATIONS HAVE NO BEARING ON THE FIRST QUESTION PRESENTED	24
CONCLUSION	26

TABLE OF AUTHORITIES

Page

Cases:

Andrus v. *Allard*, 444 U.S. 51 (1979) 6
Armstrong v. *United States*, 364 U.S. 40 (1960) 23
Board of Regents v. *Roth*, 408 U.S. 564 (1972) 9
City of Monterey v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999) 1
Concrete Pipe & Prods. of Cal., Inc. v. *Construction Laborers Pens. Trust*, 508 U.S. 602 (1993) 11, 12, 13
Connolly v. *Pension Benefit Guaranty Corp.* 475 U.S. 211 (1986) 11, 12, 13
Dolan v. *City of Tigard*, 512 U.S. 374, 383 (1994) 1, 19
Eastern Enterprises v. *Apfel*, 524 U.S. 498 (1998) 12, 18, 23
First English Evangelical Lutheran Church of Glendale v. *County of Los Angeles*, 482 U.S. 304 (1987) 20
Good v. *United States*, 189 F.3d 1355 (Fed Cir. 1999) 3
Hawaii Housing Auth. v. *Midkiff*, 467 U.S. 229 (1984) 20
Herskovits v. *Irwin*, 149 A. 195 (Pa. 1930) ... 7
Hodel v. *Irving*, 481 U.S. 704 (1987) 15, 16, 21, 22
Itel Containers Int'l Corp. v *Huddleston*, 507 U.S. 60 (1993) 24
Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 6, 7, 18, 21, 24
Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) 13, 15, 18, 23
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) 1, 2, 16, 18, 23, 25
Penn Central Trans. Co. v. *New York City*, 438 U.S. 104 (1978) ..... *passim*
Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 4

TABLE OF AUTHORITIES—Continued

Page

Pension Benefit Guaranty Corp. v. *R.A. Gray & Co.*, 467 U.S. 717 (1984) 11
Phillips v. *Washington Legal Found.*, 524 U.S. 156 (1998) 20
Pruneyard Shopping Center v. *Robins*, 447 U.S. 74 (1980) 7–8, 18
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 (1984) ..... *passim*
Smith v. *Allwright*, 321 U.S. 649 (1944) 22
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980) 8–9, 11, 20, 24

Constitutional Provisions:

U.S. Const. amend. V. (Takings Clause) ..... *passim*

Miscellaneous:

William Blackstone, Commentaries on the Laws of England (1766) (Legal Classics Library ed., 1983) 25
David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888-1986 (1990) 23
John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535 (1994) 17
Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. L. 215 (1995) 19, 20
Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. Urb. & Contemp. L. 3 (1987) 7
Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 4

INTEREST OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a nonprofit public interest law and policy center based in Washington, D.C., with supporters across the Nation. WLF regularly appęars in legal proceedings before federal and State courts to defend the principles of free enterprise and limited government. WLF has appeared as *amicus curiae* before this and other federal courts in cases involving Fifth Amendment regulatory takings claims. *See, e.g., City of Monterey* v. *Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994); *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on several occasions. *Amici* submit this brief in support of Petitioner and with the consent of all parties. A letter conferring blanket consent on all *amici* has been filed with the Clerk of the Court.[1]

SUMMARY OF ARGUMENT

Since its adoption by the Court in 1977, the phrase "reasonable investment-backed expectations" has bedeviled regulatory takings doctrine. Never precisely defined and invoked in a broad range of circumstances, it has proven to be neither a determinate tool of adjudication nor a reliable anchor to the constitutional text. Worse yet, inquiry into an owner's "reasonable investment backed expectations"

---

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the Washington Legal Foundation, its supporters, and its counsel made a monetary contribution to the preparation and submission of this brief.

has too often proceeded unfairly. It has been routinely used to deny takings claims rather than to support them.

For these reasons, regulatory takings doctrine would be generally better off without the inquiry into "reasonable investment backed expectations." Three exceptions must be made, however, to serve the purposes of *stare decisis*. An exception occurs when an owner can be said not to have an interest amounting to "private property" on which to base a claim for just compensation. Another exists when the government attempts to restrict an owner's use of property after having given its permission for development. A catchall exception would allow the owner's "reasonable investment backed expectations" to be considered in any case where that factor supplied the ground of decision in a prior case indistinguishable from the case at bar.

None of these exceptions fairly applies here. Mr. Palazzolo's claim arises from a bona fide property interest, the government has created no vested rights, and his claim falls outside the catchall exception. An inquiry into Mr. Palazzolo's "reasonable investment backed expectations" has no part to play in deciding the first Question Presented.

ARGUMENT

The first Question Presented asks "[w]hether a regulatory takings claim is *categorically* barred whenever the enactment of the regulation predates the claimant's acquisition of the property." Pet. at i. On this point the Supreme Court of Rhode Island issued two holdings, one in the context of Mr. Palazzolo's categorical takings claim under *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), Pet. App. A-16, the other under the heading of

"reasonable investment backed expectations." This second holding supplies the focus of our arguments.

With regard to Mr. Palazzolo's takings claim under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), the lower court found the factor of "reasonable investment backed expectations" "dispositive," concluding that it "need not consider the other factors of the *Penn Central* test." *Id.* Specifically, the court reasoned that when Mr. Palazzolo acquired his property "there were already regulations in place limiting Palazzolo's ability to fill the wetlands for development. In light of these regulations, Palazzolo could not reasonably have expected that he could fill the property and develop a seventy-four-lot subdivision." Pet. App. A-17 (citing *Good* v. *United States*, 189 F.3d 1355, 1361–62 (Fed. Cir. 1999)). Because the lower court construed the existence of the State wetlands permitting scheme at the time of property acquisition as decisive evidence of Mr. Palazzolo's "lack of reasonable investment-backed expectations," *id.*, resolving the first Question Presented may require the Court to take a fresh look at how that expression has been interpreted and applied.

I. INQUIRING INTO AN OWNER'S "REASONABLE INVESTMENT BACKED EXPECTATIONS" HAS BRED UNCERTAINTY, INCOHERENCE, AND UNFAIRNESS IN REGULATORY TAKINGS DECISIONS

The term "investment backed expectations" entered the lexicon of regulatory takings jurisprudence in *Penn Central*, 438 U.S. 104. The Court held that New York City's Landmark Preservation Law did not effect a taking by preventing the construction of a 50-story office building over Grand Central Terminal. *Id.* at 138. In characterizing its prior regulatory takings cases, the Court identified three "factors that

have particular significance." *Id.* at 124. These included "[t]he economic impact of the regulation on the claimant," "the character of the governmental action," and "the extent to which the regulation has interfered with distinct investment-backed expectations."[2] *Id.*

Rather than defining this novel formulation, the Court proceeded by analogy. It relied on the seminal case of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) to illustrate "the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" 438 U.S. at 127. In *Mahon* the Court found that a Pennsylvania law prohibiting coal mining where it would cause the subsidence of certain houses resulted in a taking, when the coal owners had contractually reserved the right to mine under those houses. 260 U.S. at 414–15. The *Penn Central* Court suggested that the Pennsylvania law at issue in *Mahon* had impermissibly frustrated the coal owners' investment backed expectations. The law accomplished this result by making it "commercially impracticable to mine the coal," which "had nearly the same effect as the complete destruction of rights claimant had reserved from the owners of the surface land." 438 U.S. at 127. However, the Court's discussion left open the question whether it understood the relevant "expectations" in terms of the simple fact of property

[2] The Court apparently borrowed the phrase from a law review article, *see* 438 U.S. at 128, where Professor Michelman couched the diminution of value test in terms of "whether or not the measure in question can easily be seen to have practically deprived the claimant of some *distinctly perceived, sharply crystallized, investment-backed expectation*." Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1233 (1967) (emphasis added).

ownership or in the special circumstance of an express contractual reservation of rights.

Turning to the validity of the New York City Landmark Act, the *Penn Central* Court invoked "investment backed expectations" to deny the owners' contention that they could "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. In particular, the Court explained, its precedent furnished no support for the notion "that full use of air rights is so bound up with the investment-backed expectations of appellants that governmental deprivation of these rights invariably—*i.e.*, irrespective of the impact of the restriction on the value of the parcel as a whole—constitutes a 'taking.'" *Id.* at 130 n.27.

Certain features of the "reasonable investment backed expectations" factor stand out from its debut in *Penn Central*. Like the "economic impact of the regulation on the claimant," *id.* at 124, it directs attention toward the owner's interest rather than the government's. The manner of applying the factor diminished any apparent advantage to the owners, however, by asking what expectations they lacked rather than what they possessed. Despite the Court's use of the words "investment backed expectations" as a factor having "particular significance," *id.*, it remained unclear exactly why the owners' expectations to develop the airspace above Grand Central Station were not "distinct" and "investment backed." The distinction between "discrete segments," *id.* at 130, and the "parcel as a whole," *id.* at 131, did not straightforwardly deny the owners' contention that "the airspace above the Terminal is a valuable property interest." *Id.* at 130. With these questions

unanswered, clarifying the meaning of "investment backed expectations" was left for another day.

In *Andrus* v. *Allard*, 444 U.S. 51 (1979) the Court upheld Department of the Interior regulations banning the sale of certain "avian artifacts," *id.* at 64, especially Indian relics crafted from eagle feathers. The owners claimed that the law imposed an uncompensated taking of their property. *Id.* at 67–68. In the course of declining the government's argument that the owners lacked standing merely because they had failed to allege that they acquired the artifacts before the law banning their sale became effective, *id.* at 64 n.21, the Court shed further light on its understanding of "reasonable investment backed expectations." "The timing of acquisition of the artifacts is relevant to a takings analysis of appellees' investment-backed expectations, but it does not erect a jurisdictional obstacle at the threshold." *Id.* Nonetheless, the Court did not directly explain how and why the "timing of acquisition" affected the owners' investment backed expectations. Nor did it clarify why such expectations were not impermissibly frustrated when the Court's refusal to grant just compensation left the owners holding a title whose only economic value lay in the dubious right to "exhibit the artifacts for an admissions charge." *Id.* at 66.

In *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), the Court concluded that the Takings Clause obligated the federal government to compensate the owners of a Hawaiian marina if it wished to open the marina to the public. *Id.* at 180. The Court described the marina as "a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by [the owners] with the consent of the Government." *Id.* at 179. While acknowledging that the government's permission

to dredge the channel "cannot 'estop' the United States," the Court emphasized that such permission "can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property." *Id.*

Kaiser thus appears to have rested, at least in part, on the Court's judgment that the government created reasonable investment backed expectations when it granted permission to dredge Kuapa Pond and that the government's later attempt to open the pond for public use represented an impermissible interference with such expectations. Supporting this judgment is the long-settled doctrine of vested rights. This doctrine holds that an owner can claim protection from a regulatory change if he can show that he relied in good faith on the government's permission "by making substantial expenditures on his development." Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 J. Urb. & Contemp. L. 3, 37 (1987); *see also Herskovits* v. *Irwin*, 149 A. 195, 197 (Pa. 1930) (explaining the doctrine of vested rights).

In *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), the Court held that no taking had resulted from provisions of the California Constitution, which prohibited the owner of a shopping center from interfering with the reasonable activities of high school students soliciting support for a United Nations resolution on his property. *Id.* at 88. The Court attempted to distinguish *Kaiser Aetna*. There, it said, the federal government's "attempt to create a public right of access to the improved pond interfered with Kaiser Aetna's 'reasonable investment backed expectations.'" *Id.* at 84. In *Pruneyard*, on the contrary, the Court reasoned that the owners had "failed to

demonstrate that the 'right to exclude others' is so essential to the use or economic value of [his] property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84.

The Court's attempt to distinguish *Kaiser Aetna* clouded the meaning of reasonable investment backed expectations. *Kaiser Aetna* chiefly rested on the holding that "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." 444 U.S. at 179–80. If the right to exclude is "so universally held to be a fundamental element of the property right," *id.*, one wonders why a shopping center owner's right to exclude unwanted petition-gatherers fails to qualify as a *reasonable* investment-backed expectation. Certainly both owners had substantially invested in developing their property and both had justified their takings claim based on the alleged violation of their right to exclude. Perhaps the answer lies in the breadth of the owner's asserted right. In *Kaiser Aetna* the government had tried to force the owners of a private marina to open it to the public, while in *Pruneyard* the government prevented the owner of a shopping mall from excluding only selected members of the public. Assuming that this correctly harmonizes the cases, it is still difficult to see how a reasonably prudent owner could have known in advance that one exercise of the right to exclude would be backed with the constitutional guarantee of compensation, while the other would not.

In *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980), the Court determined that a Florida county had imposed a taking by appropriating "the interest accruing on an interpleader fund deposited in the registry of the county court, when

a fee . . . [was] also charged for the clerk's services in receiving the fund into the registry." *Id.* at 155–56. The concept of an owner's expectations was refined by the Court's teaching that "a mere unilateral expectation or an abstract need is not a property interest entitled to protection." *Id.* at 161 (citations omitted). However, the Court found that the creditors claiming the disputed interest "had more than a unilateral expectation. The deposited fund was the amount received as the purchase price for Webb's assets. It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county." *Id.* The Court therefore concluded that the creditors "had a state-created property right to their respective portions of the fund." *Id.*

Webb's reaches the correct result, supported by sound reasoning. In disposing of the argument that Webb's lacked reasonable investment backed expectations, the Court relied on the distinction between "a state created property right" and "a mere unilateral expectation or an abstract need," *id.*, as a criterion for excluding owner expectations that do not deserve constitutional protection. This approach to identifying bona fide reasonable investment backed expectations is grounded on the principle that "'[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .'" *Id.* (quoting *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972)).

In *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), the Court found "the force" of reasonable investment backed expectations "so overwhelming," *id.* at 1005, that it alone decided the case. There the Court held that a taking had resulted from the

government's disclosure of trade secret information submitted with applications for certain pesticide registrations. *See id.* at 1011. Disclosure of data that had been submitted from 1972 to 1978, when the statute guaranteed confidentiality and thus "formed the basis of a reasonable investment-backed expectation," *id.*, would have destroyed the property value of trade secrets. Such disclosure constituted a taking. *Id.* In contrast, the Court reasoned, disclosure following 1978 statutory amendments setting forth conditions of data disclosure effected no taking, because applicants voluntarily submitting data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality. *Id.* at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, because the Trade Secrets Act merely protected against "unauthorized" disclosure. *Id.* at 1008–10.

Monsanto thus equated "reasonable investment backed expectations" with regulatory notice. When federal regulations promised confidentiality, the Court held the government to that promise by finding that Monsanto had reasonable investment backed expectations during the period of time the regulations were in effect. When the federal regulation gave Monsanto notice that loss of confidentiality was the price of obtaining government registration, however, the Court found that the exchange of confidentiality for registration meant Monsanto lacked reasonable investment backed expectations. Once again, the analysis raises troubling questions. Why excuse the government from compensating Monsanto for the disclosure of trade secrets, merely because the law permitted the government to make such disclosures? Such a principle, if taken to the limit of its logic,

would allow the government "'by *ipse dixit* . . . [to] transform private property into public property without compensation . . . .'" *Id.* at 1012 (quoting *Webb's*, 449 U.S. at 164). As the *Monsanto* Court itself acknowledged, "'This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Id.* (quoting *Webb's*, 449 U.S. at 164).

In *Connolly* v. *Pension Benefit Guaranty Corp.* 475 U.S. 211 (1986), the Court turned aside a facial challenge to the "withdrawal liability," *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 725 (1984), provisions of the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA). The Court concluded that the retroactive imposition of liability for pension plan withdrawal posed no facial violation of the Takings Clause. *Id.* at 228 (O'Connor, J., concurring). Such liability did not impermissibly frustrate reasonable investment backed expectations, the Court reasoned, because the employer had at least constructive notice that Congress might bolster the legislative scheme to accomplish its legislative aim that employees receive promised benefits. *Id.* at 226–27.

Seven years later, in *Concrete Pipe & Products of California, Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993), the Court followed *Connolly* to deny a takings claim based on an as applied challenge to the same liability provisions of the MPPAA at issue in *Connolly*. *Id.* at 605. The Court held that, given the prevalence of federal regulation in the field of private pension funds, the objecting employer "could have had no reasonable expectation that it would not be faced with liability for promised benefits." *Id.* at 646. Moreover, the Court observed, the employer's reliance on a statutory limitation of liability was "misplaced, there being no reasonable

basis to expect that the legislative ceiling would never be lifted." *Id.* (footnotes omitted).

Contrast *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998), where the Court determined that a federal law effected a taking when it allocated retroactive liability for health benefits to a coal company that had left the coal industry more than three decades earlier. *Id.* at 529 (plurality opinion). The Court rested that decision in part on its conclusion that the law "substantially interferes with Eastern's reasonable investment-backed expectations." *Id.* at 532. Not only did the law "reach[ ] back 30 to 50 years to impose liability," *id.*, a degree of retroactivity considered "particularly far reaching." *Id.* at 534. Such liability was "not calibrated either to Eastern's past actions or to any agreement—implicit or otherwise—by the company. Nor would the pattern of the Federal Government's involvement in the coal industry have given Eastern 'sufficient notice' that lifetime health benefits might be guaranteed to retirees several decades later." *Id.* at 536 (quoting *Connolly* v. *Pension Ben. Guar. Corp.*, 475 U.S. 211, 227 (1986).

Connolly, *Concrete Pipe*, and *Eastern Enterprises* belong together, for purposes of assessing the Court's treatment of reasonable investment backed expectations. *Connolly* is perhaps best explained as a facial challenge case, where the takings claim predictably failed to invalidate the statute. *See* 475 U.S. at 228 (O'Connor, J., concurring). *Concrete Pipe* and *Eastern Enterprises* present more difficult questions. *Concrete Pipe* relied on *Connolly* to hold that constructive notice sufficiently diminished an owner's reasonable investment backed expectations to defeat a takings claim. 508 U.S. at 646. Yet neither case adequately explained how the passage of one regulatory scheme

furnishes sufficient notice, whether constructive or actual, to defeat a takings claim based on changes (sometimes substantial changes) to that scheme.

Eastern Enterprises is in some tension with *Concrete Pipe and Connolly*. There the Court found that the owners had reasonable investment backed expectations in avoiding liability, despite the owners' decades-long experience paying out certain benefits to coal workers. 524 U.S. at 532. Distinguishing the cases appears to turn on the length of retroactive effect, *see id.* at 534, and the degree of "calibration," measured as the marginal change in out-of-pocket liability relative to a claimant's "past actions or to any agreement." *Id.* at 536. However, neither of these facts fits particularly well within the category of reasonable investment backed expectations. Retroactivity seems more a problem of due process than regulatory takings, as Justice Kennedy perceived, 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part), and the marginal change in out-of-pocket costs fits most snugly within the independent inquiry into a regulation's "economic impact." *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978).

Of particular significance for the Question Presented is the Court's decision in *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987). There the Court found a taking where a state agency conditioned its grant of permission to rebuild a house on the owner's "transfer to the public of an easement across their beachfront property." *Id.* at 827. Because "the permit condition [failed to] serve[ ] the same governmental purpose as the development ban," *id.* at 837 (a relationship labeled the "essential nexus," *id.*) the Court understood it as "the obtaining of an easement to serve some valid governmental purpose, but without just compensation." *Id.* As such, the

condition was invalid without just compensation. *Id.* at 841–42.

Writing in dissent, Justice Brennan charged that the owners "can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean." *Id.* at 857 (Brennan, J., dissenting). He based this contention on two reasons. First, he asserted that both the California Constitution and the state code "clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights . . . ." *Id.* at 858. Second, Justice Brennan turned to *Ruckelshaus* v. *Monsanto*, 467 U.S. 986 (1984), from which he concluded that the owners lacked reasonable investment backed expectations because they "were on notice that new developments would be approved only if provisions were made for lateral beach access." 483 U.S. at 860 (quoting *Monsanto*, 467 U.S. at 1005).

The Court sharply disagreed. It understood *Monsanto* not as standing for the "peculiar proposition that a unilateral claim of entitlement by the government can alter property rights," but rather as a case where an owner had sacrificed certain property rights to obtain a "valuable Government benefit." *Id.* at 833 n.2. Because the Court considered that "the right to build on one's own property . . . cannot remotely be described as a 'government benefit,' it concluded that "the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary 'exchange' . . . that we found to have occurred in *Monsanto*. *Id.* (quoting *Monsanto*, 467 U.S. at 1007). The Court added that the owners' Fifth Amendment right to compensation is unaffected by the fact that they acquired the land after the coastal

land use regulations were being enforced. "So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot." *Id.*

Nollan contributed important elements to the doctrine of reasonable investment-backed expectations. The Court directly refuted Justice Brennan's attempt to push *Monsanto* to the limit of its logic. Notice of a regulatory permit scheme does not, the Court said, automatically destroy an owner's reasonable investment backed expectations in developing his property. The Court also declined to characterize the acquisition of property after the enactment of a regulation as a bar to the owner's Fifth Amendment claim. *Nollan* thus furnishes compelling support for resolving the first Question Presented in favor of Mr. Palazzolo.

In *Hodel* v. *Irving*, 481 U.S. 704 (1987), the Court found that certain members of the Ogala Sioux Tribe had suffered a taking from a federal law that abolished the right to transfer small fractionated interests in reservation land by intestacy or devise. *Id.* at 718. However, the Court doubted whether the owners' descendants had "'investment-backed expectations' in passing on the property." *Id.* at 715. Fueling its doubts, the Court said, was the would-be beneficiaries failure to "point to any specific investment-backed expectations beyond the fact that their ancestors agreed to accept allotment only after ceding to the United States large parts of the original Great Sioux Reservation." *Id.* Evidently the Court placed great importance on the word "investment" and found that the absence of investment demonstrated the lack of "reasonable investment-backed expectations."

Because the Court ultimately decided *Irving* based on its determination that the "character of the Government regulation here is extraordinary," *id.* at 716, its discussion of investment backed expectations may be regarded as dicta, though no less troubling for that. Denying the takings claim of an owner based, even in part, on the ground that the property was acquired by devise or intestacy rather than purchase, has the effect of excluding such property from Takings Clause protection. And the Court simply failed to explain why property acquired through inheritance carries with it less potent constitutional rights than property acquired otherwise.

Lucas v. *South Carolina Coastal Council*, though not strictly speaking a "reasonable investment backed expectations" case, contributed additional detail to that doctrine. There the Court held that a state statute barring the construction of "occupiable improvements," *id.* at 1009, seaward of a particular baseline effected a taking when it deprived the owner of two beachfront lots of "all economically beneficial use" of his property. *Id.* at 1027. In contrast with the admittedly "ad hoc, factual inquiries," *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978), the Court in *Lucas* based its holding on a "categorical," *id.* at 1015, rule:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

Id. at 1027.

The issue of reasonable expectations arose indirectly, during the Court's attempt to address the

"denominator problem," John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1537 (1994), meaning the problem of identifying "the 'property interest' against which the loss of value is to be measured." 505 U.S. at 1016 n.7. The Court noted that a solution might be suggested by "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.*

Justice Stevens dissented. Criticizing the Court's holding as "wholly arbitrary," he argued that under the categorical rule "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the and's full value." *Id.* at 1064 (Stevens, J., dissenting). The Court disagreed with that description of the rule's effect. "This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Id.* at 1019 n.8. It acknowledged that "in at least *some* cases the landowner with 95% loss will get nothing, while the landowner with total loss will recover in full." *Id.* However, it pointed out that the traditional *Penn Central* factors would apply to a landowner whose loss "is one step short of complete." *Id.* For such owners, "'[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations' are keenly relevant to takings analysis generally." *Id.* (quoting *Penn Central Trans. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)).

Lucas employed the concept of "reasonable investment backed expectations" rather loosely. When referring to those expectations "shaped by the State's law of property," *id.* at 1016 n.7, it used the term "reasonable expectations." *Id.* When referring to the elements of *Penn Central*, it used the older terminology "distinct investment-backed expectations." *Id.* at 1019 n.8. The Court did not explain whether it considered the "expectations" tied to State law, which it found relevant to defining the denominator in a takings claim, synonymous with the "expectations" relevant as one factor in a multi-factor balancing test for deciding non-categorical regulatory takings claims. Nor did it explain what relationship (if any) that it perceived between these varied "expectations."

This review of the decisions suggests that inquiring into an owner's "reasonable investment backed expectations" has bred uncertainty, incoherence, and unfairness. The uncertainties we have already limned. The incoherence of decisions applying "reasonable investment backed expectations" may be attributed to its conceptual emptiness. It has been used to describe air rights that fail judicial scrutiny, *Penn Central*, 438 U.S. 104 (1978), and water rights that survive it, *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979); a prevailing right to exclude, *id.*; and a failing right to exclude, *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980); regulatory notice that defeats a takings claim, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), and regulatory notices that fail to defeat a takings claim, *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987); *Eastern Enterprises* v. *Apfel*, 524 U.S. 498 (1998). No wonder one commentator has concluded, "The Court is confused about the meaning of this term, federal and state courts divide on how to apply it, and its role

in taking law remains a puzzle." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. L. 215 (1995).

Worse still, inquiry into an owner's "reasonable investment backed expectations" has too often proceeded unfairly. "The Court has concentrated almost entirely on deciding when investment-backed expectations do not exist rather than on deciding when they can provide a basis for a taking claim." *Id.* at 225. It is a strange rule of constitutional law that deliberately honors a constitutional right more in the breach than in the observance. Suppose that First Amendment doctrine included a rule excusing content discrimination when the government could show that the speaker had no reasonable expectation that his speech would influence public policy. Just as this rule would clearly turn the words of the First Amendment on their head by privileging government censorship over the freedom to speak, so too routinely deploying "reasonable investment backed expectations" as a justification for denying takings claims turns the Fifth Amendment upside-down by privileging confiscation, or the substantial loss of property, over compensation. This flies in the face of the Court's teaching: "We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

II. THE PHRASE "REASONABLE INVESTMENT BACKED EXPECTATIONS" BEARS NO CLOSE RELATION TO THE LANGUAGE OF THE FIFTH AMENDMENT TAKINGS CLAUSE

Apart from the uncertainty, incoherence, and unfairness it has bred, inquiry into an owner's

"reasonable investment backed expectations" is also flawed because it is not anchored in the text of the Takings Clause. Correctly evaluating the place of "reasonable investment backed expectations" in regulatory takings doctrine "begin[s] with direct reference to the language of the Fifth Amendment." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U.S. 304, 314 (1987); *see also Penn Central Transp. Co.* v. *City of New York*, 438 U.S. 142 (Rehnquist, J., dissenting) (arguing for "a closer scrutiny" of the language of the Fifth Amendment).

Those words say, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984) all but eliminated "public use" as an issue for adjudication. *Id.* at 241. Interpreting the Takings Clause thus centers on the meaning of "private property," "taken," and "just compensation." From its understanding of these key terms, "[t]he Court recognizes three distinct issues implicated by a takings claim: whether the interest asserted by the plaintiff is property, whether the government has taken that property, and whether the plaintiff has been denied just compensation for the taking." *Phillips* v. *Washington Legal Found.*, 524 U.S. 156, 172 (1998) (Souter, J., dissenting). Only the first two issues are relevant in this case.

The phrase "reasonable investment backed expectations" bears no close relationship with the words chosen by the authors of the Fifth Amendment. *Cf.* Mandelker, 27 Urb. L. at 225 ("A major problem in the decisions may be the choice of terms to describe this taking element."). The word "expectations" is both over- and underinclusive. It could be said to embrace a "unilateral expectation" or "an abstract need." *Webb's Fabulous Pharmacies, Inc.*

v. *Beckwith*, 449 U.S. 155 (1980). The classic example lies with the owner who purchases 100 acres of agricultural land on the edge of town. His "expectation" that the property will be eventually rezoned for more intensive and valuable uses could not be vindicated, were he to bring a takings claim against the town, because his "expectation" does not qualify as "private property." At the other end of the spectrum, the category of "expectations" has been drawn narrowly enough to exclude property interests independently protected under State law. *See, e.g.*, *Penn Central*, 438 U.S. at 130 n.27.

Choosing the word "expectation" also raises the question whether these expectations are subjective or objective, to be tested according to proof of a particular owner's actual expectations regarding property or according to a court's independent assessment. With the substitution of "reasonable" for "distinct" in the formulation, *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979) the Court implicitly settled this question early on in favor of objectivity. But the addition of that adjective has not removed the subjectivity inherent in the word it modifies. And it is the inherent subjectivity of the word "expectations," not the words "taken" or "private property," that accounts for much of the uncertainty and incoherence we have described. These faults belong to the judicial test used to interpret the Fifth Amendment, not to the language of the amendment itself.

It remains unclear why only "investment backed" expectations deserve constitutional protection when the Constitution uses the words "private property." What then about property acquired through gift, devise, or intestacy? *Hodel* v. *Irving*, 481 U.S. 704 (1987) highlighted the potential for mischief when

it suggested, albeit in dicta, that property not acquired through investment may not qualify for Fifth Amendment protection. *See id.* at 715. *Irving* illustrates how the judicial test of "reasonable investment backed expectations" might be used to substantially reduce the range of property interests given constitutional protection, despite the clear language of the Fifth Amendment securing compensation for the taking of "private property."

III. WITH THREE EXCEPTIONS "INVESTMENT-BACKED EXPECTATIONS" OUGHT TO BE ABANDONED AS A FACTOR IN REGULATORY TAKINGS CASES

A review of the Court's decisions and an analysis of "reasonable investment backed expectations" in light of the text of the Fifth Amendment reveals at least three critical flaws. First, "reasonable investment backed expectations" is not a phrase closely anchored to the constitutional text. Decisions applying it can be expected to wander from constitutional first principles.

Second, inquiring into an owner's "reasonable investment backed expectations" has produced a pattern of decisions that is uncertain and incoherent. In a word, the formulation is indeterminate. Announcing that it applies says little if anything about how and why the case will be decided. Contrary to the rule of law, the meaning of "reasonable investment backed expectations," as applied in a particular case, remains unclear until it receives its limited definition, "good for this day and train only." *Smith* v. *Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). Such indeterminacy leaves takings claims vulnerable to manipulation, despite the Court's affirmation that "[w]e view the Fifth Amendment's Property Clause to be more than a

pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination." *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 841 (1987); *see Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1025 n.12. (1992).

Third, the application of "reasonable investment backed expectations" has bred unfairness. One should not be terribly surprised by this, given that *Penn Central* itself was "insensitive to taking clause values." David P. Currie, The Constitution in the Supreme Court: The Second Century, 1888-1986, at 521 n.104 (1990). Yet the unfairness of applying an analytical tool principally to deny takings claims is fundamentally inconsistent with a constitutional provision whose aim is "to prevent the government from 'forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Eastern Enterprises* v. *Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (*Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)).

"Reasonable investment backed expectations" ought to be generally abandoned as a factor in regulatory takings cases. As bold as it seems, this proposal would not require the Court to overrule a single precedent because the inquiry into "reasonable investment backed expectations," though a familiar part of regulatory takings cases, has rarely served as the ground of decision. Carving out three exceptions would amply serve the purposes of *stare decisis*. *Cf. Itel Containers Int'l Corp.* v *Huddleston*, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (recommending the abandonment of negative Commerce Clause doctrine, except as necessary to preserve reliance interests).

First, the phrase performs a useful service by alerting takings claimants to the requirement that any takings claim must be grounded in "private property" independently created under State or federal substantive law. *See Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155 (1980).

Second, the phrase "reasonable investment backed expectations" accurately captures the common law principle of "vested rights." *See Kaiser Aetna* v. *United States*, 444 U.S. 164, 179 (1979). "A similar reliance rule is appropriate in deciding when investment-backed expectations are reasonable and entitled to protection under the Taking Clause." Daniel R. Mandelker, *Investment-Backed Expectations in Taking Law*, 27 Urb. L. 215, 237 (1995).

Third, "reasonable investment backed expectations" may supply the ground of decision in any other case where that factor supplied the ground of decision in a case indistinguishable from the case at bar. *Cf. Itel Containers Int'l Corp.* v *Huddleston*, 507 U.S. 60, 78–79 (1993) (Scalia, J., concurring in part and concurring in the judgment) (allowing for negative Commerce Clause challenges "against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court"). The principal case that appears to fit this exception is *Monsanto*. Because the holding in *Monsanto* has been sharply limited, *see Nollan* v. *California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987), the reach of this exception is correspondingly limited, as well.

IV. MR. PALAZZOLO'S "REASONABLE INVESTMENT BACKED EXPECTATIONS HAVE NO BEARING ON THE FIRST QUESTION PRESENTED

Contrary to the decision below, *see* Pet. App. A-17, Mr. Palazzolo's takings claim cannot be properly

analyzed according to his reasonable investment backed expectations. His claim fits none of the narrow situations we have described where an owner's reasonable investment backed expectations form a correct part of the constitutional analysis. There is no doubt that Mr. Palazzolo has asserted a bona fide property interest. Fee simple title to real property, *id.* at A-2–A-3, is "an estate with a rich tradition of protection at common law." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992); *see also* 2 William Blackstone, Commentaries on the Laws of England 104–05 (1766) (Legal Classics Library ed., 1983) (describing the rights of a tenant in fee simple). Rhode Island has conferred no vested interest on Mr. Palazzolo, because the State has not wavered from its decision to deny him a development permit. *See* Pet. 2–3. And Mr. Palazzolo's claim falls outside the catchall category. As the Court has held, "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit.'" *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987). "Reasonable investment backed expectations" thus have no legitimate role to play in deciding whether Mr. Palazzolo's takings claim is categorically barred, merely because he acquired the property after the State wetlands regulation was adopted.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Rhode Island should be reversed.

Respectfully submitted,

Daniel J. Popeo
R. Shawn Gunnarson
Counsel of Record
Washington Legal Foundation
2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302

November 22, 2000 *Counsel for Amici Curiae*

Supreme Court, U.S.
FILED
NOV 24 2000
CLERK

NOV 24 2000

No. 99-2047

In the Supreme Court of the United States

ANTHONY PALAZZOLO, *Petitioner*,

v.

RHODE ISLAND *ex rel.* PAUL K. TAVARES, AND COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ Of Certiorari To The Supreme Court of Rhode Island

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION AND RHODE ISLAND FARM BUREAU IN SUPPORT OF PETITIONER

JOHN J. RADEMACHER
General Counsel
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068
(847) 685-8600

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY W. SARLES
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JOHN J. KUPA
The Meadows Professional Office Building
1130 Ten Rod Road
North Kingstown, Rhode Island 02852
(401) 294-5566

Counsel for the Amici Curiae

28 pp

QUESTIONS PRESENTED

1. Whether a regulatory taking is categorically barred whenever the enactment of the regulation predates the claimant's acquisition of the property.

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "less ambitious uses" in order to ripen the takings claim.

3. Whether the remaining permissible uses of regulated property are economically viable merely because the property retains a value greater than zero.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. A FORMAL TRANSFER OF PROPERTY BY OPERATION OF LAW DOES NOT TRIGGER INQUIRY INTO THE REASONABLE EXPECTATIONS OF THE TRANSFEREE IN LIGHT OF THE REGULATORY REGIME AT THE TIME OF THE TRANSFER 4

II. PETITIONER'S TAKINGS CLAIM IS RIPE 6

III. RHODE ISLAND TOOK PETITIONER'S PROPERTY BY ERASING SUBSTANTIALLY ALL OF ITS VALUE 7

A. Erasing Substantially All Of A Property's Value Through Regulation May Be A Categorical Taking 9

B. As In Physical Takings Cases, A Partial Regulatory Taking Should Result In At Least Partial Compensation 13

C. The Consequences Of The Decision Below Are Absurd And Carry Heavy Social Costs 15

TABLE OF CONTENTS—Continued

Page

D. Even If The State's Taking Was Not Categorical, The Severe Economic Impact On Mr. Palazzolo Entitles Him To Just Compensation 18

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page:**

Andrus v. *Allard*, 444 U.S. 51 (1979) 4, 18

Armstrong v. *United States*, 364 U.S. 40 (1960) 18

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995) 1

Bauman v. *Ross*, 167 U.S. 548, 573 (1897) 14

City of Monterey v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999) ..... *passim*

Concrete Pipe & Prods., Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 10

Del Monte Dunes, Ltd. v. *City of Monterey*, 95 F.3d 1422 (9th Cir. 1996) 8

Dolan v. *City of Tigard*, 512 U.S. 374 (1994) ..... *passim*

Eastern Enters. v. *Apfel*, 524 U.S. 498 (1998) 19

First English Evangelical Lutheran Church v. *County of Los Angeles*, 482 U.S. 304 (1987) 11

Florida Rock Indus., Inc. v. *United States*, 18 F.3d 1560 (Fed. Cir. 1994) 11, 12, 19

Franklin v. *United States*, 2000 WL 1665135, (Fed. Cir. Nov. 3, 2000) 5, 13

Hodel v. *Irving*, 481 U.S. 704 (1987) 10, 19

TABLE OF AUTHORITIES—Continued

Page

Kaiser Aetna v. *United States*, 444 U.S. 164 (1979) 10, 18

Keystone Bituminous Coal Ass'n v. *DeBenedictis*, 480 U.S. 470 (1987) 10

Kirby Forest Indus., Inc. v. *United States*, 467 U.S. 1 (1984) 13

Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) 15

Loveladies Harbor, Inc. v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994) 12

Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992) ..... *passim*

Nollan v. *California Coastal Comm'n*, 483 U.S. 825 (1987) ..... *passim*

Palm Beach Isles Assocs. v. *United States*, 208 F.3d 1374 (Fed. Cir. 2000), modified on panel rhg., sub nom. *Franklin* v. *United States*, 2000 WL 1665135 (Fed. Cir. Nov. 3, 2000) 5

Penn Central Transp. Corp. v. *New York City*, 438 U.S. 104 (1978) 4, 17

Pennell v. *City of San Jose*, 485 U.S. 1 (1988) 10

Pennsylvania Coal Co. v. *Mahon*, 260 U.S. 393 (1922) 11,19

TABLE OF AUTHORITIES—Continued

Page

Pumpelly v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166 (1872) 13

San Diego Gas & Elec. Co. v. *City of San Diego*, 450 U.S. 621 (1981) 14

Solid Waste Agency of Northern Cook County v. *United States Army Corps of Engineers*, No. 99-1178 ... 1

Suitum v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) 1, 7, 10

United States v. *Causby*, 328 U.S. 256 (1946) 15

United States v. *General Motors Corp.*, 323 U.S. 373 (1945) 12

United States v. *Pewee Coal Co.*, 341 U.S. 114 (1951) 13

United States v. *Security Indus. Bank*, 459 U.S. 70 (1982) 17

Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 (1980) 18

Williamson County Reg'l Planning Comm'n v. *Hamilton Bank*, 473 U.S. 172 (1985) 10

Yancey v. *United States*, 915 F.2d 1534 (Fed. Cir. 1990) ... 19

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous:

FEDERALIST NO. 10 (C. Rossiter ed. 1961) 8

FEDERALIST NO. 54 (C. Rossiter ed. 1961) 9

J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55 (1888) 12

McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267 (1988) 8

J. NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) 8

Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561 (1984) 17

INTEREST OF THE AMICI CURIAE[1]

The American Farm Bureau Federation ("AFBF") was established in 1920 to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.9 million member families. AFBF's farmer and rancher members own or lease significant amounts of land, on which they depend for their livelihoods and on which all Americans depend for high quality, affordable food and other basic necessities. Because that land is subject to increasingly onerous regulation from all levels of government—such as the state wetlands regulation at issue in this case—AFBF and its members are vitally interested in the legal rules establishing the availability of compensation under the Takings Clause when regulation goes too far. Accordingly, AFBF has participated as an amicus in this Court in support of landowners in takings cases such as *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), *Suitum* v. *Tahoe Regional Planning Agency*, 520 U.S. 725 (1997), and *City of Monterey* v. *Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999), as well as in cases concerning the permissible scope of federal land use regulation such as *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *Solid Waste Agency of Northern Cook County* v. *United States Army Corps of Engineers*, No. 99-1178.

The Rhode Island Farm Bureau ("RIFB") is a voluntary, non-profit organization with 2800 members which advocates for those involved in Rhode Island agriculture and rural living. It is the policy of RIFB, adopted by vote of its members, "to protect the right of private owners in questions concerning the use of private

---

[1] This brief was not written in whole or in part by any party and no one other than the amici made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the clerk.

property for the public good. That right shall be a just compensation for use taken."

Because the land of many of Rhode Island's commercial farmers abuts Narragansett Bay, Rhode Island Sound, or the tidal Sakonnet River, farmers generally must obtain a permit from respondent Coastal Resource Management Council ("CRMC") before they can make full use of their land. RIFB has been active in attempting to constrain CRMC's powers through legislation and in seeking to protect Rhode Island's farm community by advocating state takings legislation—ultimately without success. As the opportunity to make a moderate living from agriculture is diminishing, farmers need the protection of the Fifth Amendment and the federal courts if they are to find economically feasible ways to use their land and remain in the agricultural business.

SUMMARY OF ARGUMENT

This case presents three issues of great importance to AFBF, RIFB, and their members. First, farmers and ranchers are threatened by formalistic rules that measure "investment backed expectations" as at the time of a transfer of property that occurs by operation of law—here, the 1978 transfer from petitioner Anthony Palazzolo's single-shareholder corporation to Palazzolo in his personal capacity when Rhode Island revoked his corporation's charter—or that otherwise do not occur as the result of an arms-length sale. Farm and ranch properties often are owned and worked by the same family for generations—facilitated by transfers among individuals, family corporations, and family partnerships. Those sorts of bequests and formal transfers—still less involuntary transfers by operation of law like that involved here—should have no substantive effect at all on determining a landowner's reasonable investment backed expectations.

Second, ripeness rules that require landowners to return repeatedly to regulating agencies with more and more limited and

less and less economically viable plans encourage gamesmanship on the part of regulators aware that they can delay or avoid a takings claim by dragging out the administrative process in this way. See *City of Monterey*, 526 U.S. 687. Such rules especially threaten the rights of farmers and ranchers, who generally lack the financial resources to engage in extended administrative proceedings.

In this brief, however, AFBF and RIFB focus primarily on a third issue of tremendous importance to America's farmers and ranchers—whether the mere fact that land retains some relatively small value and use after regulation is imposed prevents the occurrence of a compensable taking as a matter of law. If the Just Compensation Clause is not to be gutted of virtually all practical meaning—and if government regulators are to be restrained at all by that Clause—the answer to that question must be "no." On any plausible theory of takings, the destruction of almost all the value and use of land is compensable even though some minimal value and use remains. Otherwise regulators will be free to take property from individuals to benefit the public at large, free of any obligation to compensate, by the simple expedient of leaving *de minimis* value and use for the land or even—as in this case—for just a small and distinct segment of the land. If petitioner's land has not been taken, merely because a small part of it supposedly retains some economic use, no farmer or rancher is safe from huge, uncompensated regulatory burdens in the name of the public good. That is not what the Framers of the Bill of Rights contemplated.

ARGUMENT

Before focusing on the third question presented by the petition—whether a taking may occur where regulation leaves some relatively small value and use in the property—amici very briefly address why this Court should reach that issue. Neither of the Rhode Island Supreme Court's other grounds for rejecting

petitioner's takings claim—grounds that are the subject of the first two questions presented—withstands scrutiny.

I. A FORMAL TRANSFER OF PROPERTY BY OPERATION OF LAW DOES NOT TRIGGER INQUIRY INTO THE REASONABLE EXPECTATIONS OF THE TRANSFEREE IN LIGHT OF THE REGULATORY REGIME AT THE TIME OF THE TRANSFER.

The Rhode Island Supreme Court erred in attributing constitutional importance to the timing of a formalistic, involuntary 1978 transfer of the property in question from petitioner's single-shareholder corporation to petitioner in his individual capacity.

Petitioner had owned the property in some capacity ever since 1959 and 1960, acquiring another small part of it in 1969. All that happened in 1978 was that the State revoked the charter of petitioner's single-shareholder corporation, which had previously held title. As the State admits, this revocation had the effect of "devol[ving] title by operation-of-law to Mr. Palazzolo" individually. Br. in Opp. 3. Treating the date of such a formalistic, involuntary transfer as the appropriate time to determine what limitations "inhere in the title" to land as a result of "background principles of the State's law of property and nuisance" under *Lucas*, 505 U.S. at 1029, or to determine a landowner's reasonable investment-backed expectations under *Penn Central Transp. Corp.* v. *New York City*, 438 U.S. 104, 124 (1978), is inconsistent with the fairness considerations that inform the Takings Clause. See *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979) (the Takings Clause subjects governmental regulation "to the dictates of 'justice and fairness'").

Even assuming that the existence of a mere regulatory scheme is relevant to determining whether a taking has occurred[2]—and amici agree with the Federal Circuit that "[t]he existence of a regulatory regime does *not* per se preclude all investment-backed expectations for development" (*Franklin* v. *United States*, 2000 WL 1665135, at *11 (Fed. Cir. Nov. 3, 2000) (emphasis added))—the compensatory purpose of the Takings Clause may not be evaded by treating formal, insubstantial transfers as triggering an inquiry into the regulatory scheme in place at the time of the transfer.

To the contrary, the economic rationale behind looking at the regulatory scheme in place at the time an owner acquires land in order to determine the owner's reasonable investment-backed expectations is the assumption that the owner discounted the price he or she paid for the property to take account of regulatory restrictions on use.[3] When the transfer has occurred not as the

---

[2] A regulatory permitting scheme that envisages agency decisionmaking particular to a parcel of land—such as Clean Water Act Section 404 permitting or Endangered Species Act "incidental take" permitting related to proposed habitat modification—is different in kind from a legal limitation on title that runs with the property, such as a negative easement or navigational servitude (see *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1385 (Fed. Cir. 2000)), and from limitations on use that flow from state nuisance law. This court has never held that a mere permitting scheme—a scheme that assumes a permit may be granted—operates as a restriction on title or is analogous to a nuisance prohibition.

[3] It follows that when a rational purchaser would not discount the price paid, or would discount only minimally, because a regulatory scheme usually does not interfere with productive use of the land—for example, the U.S. Army Corps of Engineers claims that it permits landowners to fill wetlands on their property in more than 85% of all cases governed by Section 404—that regulatory scheme

result of an arms-length sale but as the result of an involuntary transfer by operation of law—or as the result of a bequest to heirs or an inter-vivos intra-family transfer driven by estate tax or operational considerations—it is especially clear that "the prior owners must be understood to have transferred their full property rights in conveying the" property. *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987). Because petitioner's single-shareholder corporation acquired the property in issue 40 years ago, before his wetlands were regulated either by Rhode Island or by the federal government, wetlands regulatory schemes are simply irrelevant to determining the scope of petitioner's property interest or investment-backed expectations.

II. PETITIONER'S TAKINGS CLAIM IS RIPE.

Petitioner applied to the state no fewer than four times to fill the wetlands on his property over the course of two decades. CRMC and its predecessors denied each permit—taking five years to do so in one instance. Pet. App. A-4. In those circumstances, where filling the wetlands is the necessary precondition for any economic use of petitioner's property and when permission to fill them has repeatedly been denied in a series of "final decisions," petitioner need do no more to ripen his federal takings claim. See *City of Monterey*, 526 U.S. at 698 (no question takings claim was ripe where municipality put a developer through "five years, five formal [plan rejections], and 19 different site plans"); *Cooley* v. *United States*, 46 Fed. Cl. 538, 540 (2000) (takings claim ripe where U.S. Army Corps had once denied landowner a Section 404 fill permit, and was not "unripened" by Corps' demands that plaintiff submit a renewed application seeking less fill). Amici agree with the Court of Federal Claims that "[f]rom the moment [a] denial [is] signed, the right to compensation vest[s]." *Cooley*,

---

should have no relevance at all to determining the purchaser's reasonable investment-backed expectations.

46 Fed. Cl. at 548-549. But even if reapplication is required, petitioner more than satisfied that requirement here.

Any doubt about the ripeness of petitioner's takings claim is in any event conclusively resolved by his unrebutted testimony, as found by the trial court, that "CRMC informed him that any proposal involving the filling of wetlands would be denied." Pet. App. B-5. See *Suitum*, 520 U.S. at 739 (claim is ripe where "there [is] no question * * * about how the regulations at issue apply to the particular land in question").

III. RHODE ISLAND TOOK PETITIONER'S PROPERTY BY ERASING SUBSTANTIALLY ALL OF ITS VALUE.

The Rhode Island Supreme Court's ruling that Mr. Palazzolo retains "beneficial use" of his property is refuted by its own opinion. His property consists of 18 acres of wetlands and "no more than a few additional upland acres." Pet. App. A-3 n.1. The CRMC precluded him from filling the 18 acres of wetlands, effectively conscripting the bulk of his property to serve as "a refuge and feeding ground for fish, shellfish, and birds" and as a "buffer for flooding." Pet. App. A-3. As a result, petitioner must leave most of his land in an undeveloped state and forgo the opportunity to build the 74 single-family homes for which the land is subdivided—or, indeed, to make any other productive use of his wetland acres. Nevertheless, based on estimates that the uplands piece would be worth $200,000 if developed and that Mr. Palazzolo can obtain another $157,500 by donating the wetlands "as an open space gift," the court below held that his land retains enough value to prevent the CRMC's action from being a categorical taking.

As an initial matter, the record is less than clear as to how much value, if any, remains in Mr. Palazzolo's land. The purported $200,000 figure represents the value of one single-family house

that the CRMC concluded could be built on the upland portion of Mr. Palazzolo's land. Pet. 14; Br. in Opp. 19. That figure does not appear to account for any of the costs that petitioner would have to incur to develop the upland segment, and the decision below does not explain how building and marketing a single-family house surrounded by 18 acres of marshes and swamps would be economically feasible. Moreover, the nominal amount that may be available for donated land bears no relation to the land's commercial value. See *Del Monte Dunes, Ltd.* v. *City of Monterey*, 95 F.3d 1422, 1432 (9th Cir. 1996) (jury could properly conclude that City's permit denial left property owner without "an economically viable use" despite sale of property to the State of California for $800,000), aff'd, 526 U.S. 687 (1999).

In any event, even the figures used by the court below show that Rhode Island has taken "substantially all" of the value of Mr. Palazzolo's land. If his land retains $357,000 in total value, he suffered an 89 percent diminution in value from the $3.15 million that he would have reaped from the planned development of his property. The Takings Clause was intended to protect individual owners of private property from bearing such a heavy impact from government actions directed to the general public good. That is why it does not say: "Nor shall private property be taken for public use, without just compensation, *unless the property retains some value*." And the italicized phrase cannot reasonably be read into the Clause consistent with the Framers' intentions.

"[P]rotection of private property was a nearly unanimous intention among the founding generation." McConnell, *Contract Rights and Property Rights*, 76 CAL. L. REV. 267, 270 (1988). The Framers viewed the protection of property rights, and particularly rights in land, as "the first object of government." FEDERALIST NO. 10, at 78 (Madison) (C. Rossiter ed. 1961). That conviction rested on the Framers' understanding that private property constitutes "the clear, compelling, even defining, instance of the limits that private rights place on legitimate government." J. NEDELSKY,

PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 9 (1990). Indeed, they understood government to be "instituted no less for protection of the property than of the persons of individuals." FEDERALIST NO. 54, *supra*, at 339 (Madison). Hence, the Takings Clause, a bulwark against arbitrary rule that fosters respect for individuals and their right to use and reap the benefits of their property, is fundamental to our constitutional order. As this Court has emphasized, there is "no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation." *Dolan* v. *City of Tigard*, 512 U.S. 374, 392 (1994).

The decision below takes the heart out of the Takings Clause. It allows the government to transform private land into a wildlife refuge by decree, and, even worse, to avoid compensating the landowner simply by leaving him a smidgeon of property to develop. That distortion of the Takings Clause, and of this Court's takings cases, is an invitation to gamesmanship on the part of regulators and completely at odds with the constitutional guarantees of liberty and fairness on which our polity rests.

A. Erasing Substantially All Of A Property's Value Through Regulation May Be A Categorical Taking.

The standard applied by the Rhode Island Supreme Court, requiring that a challenged regulation leave the subject property with *no value whatsoever* to be a candidate for a categorical taking, represents an extremist and unjustifiable reading of this Court's precedents. In particular, the court below misread *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992). In *Lucas*, this Court recognized that a regulation that deprives land of "all economically beneficial or productive use" may effect a categorical taking. The court below focused solely on the words *all* and *use*, ignoring this Court's clear command that compensation be paid unless the regulated property retains *economically*

beneficial or productive use. This Court has never required deprivation of "all use" or "all value" for a categorical takings claim, instead using such formulations as "economically viable use,"[4] "economically feasible use,"[5] and "economically beneficial use."[6] By failing to give effect or meaning to the modifiers this Court has attached to "use," the decision below deviated from this Court's categorical taking standard and from the mandate of the Takings Clause.

Those modifiers counsel a practical approach to measuring the deprivation of a property's economic value. The holding below—that a categorical taking is always precluded unless all value is removed from every square inch of land—cannot be reconciled with this Court's insistence that the categorical takings test comport with economic reality. Such a practical approach is reflected in *Lucas*, where this Court recognized that "requiring land to be left *substantially* in its natural state" may deprive the land of "all economically beneficial or productive use" and thus be a categorical taking. 505 U.S. at 1015 (emphasis added). See also *Kaiser Aetna* v. *United States*, 444 U.S. 164, 180 (1979) (compensation is appropriate where the impact of regulation is more than "an insubstantial devaluation of petitioners' private property"). This emphasis on substantiality reflects this Court's practical perspective and refusal to elevate form over substance when

---

[4] *E.g., Del Monte Dunes*, 526 U.S. at 720; *Suitum*, 520 U.S. at 736 n.10; *Dolan*, 512 U.S. at 385; *Pennell* v. *City of San Jose*, 485 U.S. 1, 18 (1988); *Nollan*, 483 U.S. at 834; *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 495 (1987).

[5] *E.g., Lucas*, 505 U.S. at 1016 n.7; *Williamson County Reg'l Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 191 (1985).

[6] *E.g, Dolan*, 512 U.S. at 385 n.6; *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 643 (1993); *Lucas*, 505 U.S. at 1016; *Hodel v. Indiana*, 452 U.S. 314, 335 (1981).

analyzing the economic impact of governmental regulations. See, *e.g., First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987) (denying that temporary takings are "different in kind" from permanent takings).

As Justice Holmes noted in *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 414 (1922), when a regulation has so diminished a property right as to render its exercise "commercially impracticable," the limitation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." Accordingly, an inquiry into whether purported uses are commercially practicable and purported value realistically attainable is antecedent to any determination that regulated land retains value. If they are not practicably attainable, a categorical bar to a categorical taking claim is unwarranted. See *Florida Rock Indus., Inc.* v. *United States*, 18 F.3d 1560, 1571 (Fed. Cir. 1994) ("alternative permitted activities" must be "economically realistic" and "realistically available"). This approach, amici believe, also would address the understandable concern expressed by Justice Stevens in *Lucas* about the risk of arbitrariness where "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." 505 U.S. at 1064 (Stevens, J., dissenting).

The standard applied by the court below is hard-wired to automatically reject any claim that a property regulation is a categorical taking. A court can always find some conceivable use of property. In *Lucas*, Justice Blackmun in dissent described the majority's conclusion that Lucas' property had lost all economic value as "almost certainly erroneous" because Lucas could still "enjoy other attributes of ownership, such as the right to exclude others" or "to alienate the land," and he could continue to "picnic, swim, camp in a tent, or live on the property in a moveable trailer." 505 U.S. at 1043-1044. But the Court did not adopt Justice Blackmun's suggestion that such *de minimis* or speculative uses are sufficient to defeat a categorical takings claim. Here, even if

Mr. Palazzolo can build and sell a house or erect an observation booth that attracts nature lovers, these are not reasonable economic uses of the 20 acre-plus parcel. At best, they create *de minimis* value that bears no comparison to the real commercial value of the land. See *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171, 1181-1182 (Fed. Cir. 1994) (where permit denial left relevant parcel with only "*de minimis*" value, there was "a total taking").

The court below failed to recognize that leaving Mr. Palazzolo with "ownership" of land with little or no right to *use* it destroys his property interest. Ownership of property is a "bundle of rights" (*Dolan*, 512 U.S. at 393) that includes "the right to possess, use and dispose of it." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377-378 (1945); see also J. LEWIS, A TREATISE ON THE LAW OF EMINENT DOMAIN § 55, at 43 (1888) ("The dullest individual among the people knows and understands that his property in anything is a bundle of rights," including "the right to use a thing in this way or that"). The Rhode Island Supreme Courts' decision treats the abrogation of one stick in that bundle—petitioner's choice as to how to use his land—as noncompensable. But the right to make "productive improvements" is an "essential use" of land. *Lucas*, 505 U.S. at 1031; see also *Nollan*, 483 U.S. at 833 n.2 (recognizing that "the right to build on one's own property" is part of the property right). And abrogation of the use stick destroys, in economic terms, the entire bundle. By rendering Mr. Palazzolo's property economically useless, the CRMC has destroyed the essence of his property rights.

Based on the above principles, the CRMC has categorically taken Mr. Palazzolo's land by preventing him from using all but a small and distinct piece of it and from using *any* of it in a viable economic sense. This case is the one forecast in *Lucas*: Rhode Island's regulation of Mr. Palazzolo's land unquestionably requires it "to be left substantially in its natural state." 505 U.S. at 1015. This Court should extinguish any lingering doubts about the

requirements for a categorical regulatory taking by, at a minimum, making clear that courts must engage in a *realistic* analysis of whether the government has effectively deprived an owner of economically beneficial and productive use of his property.

B. As In Physical Takings Cases, A Partial Regulatory Taking Should Result In At Least Partial Compensation.

Based on the impact to the property owner, condemnation is condemnation whether it is traditional or inverse. If the CRMC had physically invaded Mr. Palazzolo's land, the taking would be clear and categorical. See, *e.g.*, *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951). The result should be no different where the invasion is regulatory rather than physical. As this Court has "frequently recognized," a "radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking within the meaning of the Fifth Amendment, even if the Government has not physically intruded upon the premises or acquired a legal interest in the property." *Kirby Forest Indus., Inc.* v. *United States*, 467 U.S. 1, 14 (1984).

Ever since *Pumpelly* v. *Green Bay & Miss. Canal Co.*, 80 U.S. (13 Wall.) 166, 177-178 (1872), this Court has instructed that the government need not physically appropriate property to effect a taking so long as the practical effect is to deny the owner use of the property. Thus, regulatory impositions, if sufficiently severe, are the "equivalent of a physical appropriation" and may categorically warrant just compensation. *Lucas*, 505 U.S. at 1017; see also *Franklin* v. *United States*, 2000 WL 1665135, at *9 (Fed. Cir. Nov. 3, 2000) (regulations may have "the same effect as a physical seizure and occupation of public purposes—leaving the owner with essentially no viable economic uses whatever and no rights except bare legal title"). As Justice Brennan explained, it makes little difference to the property owner "whether his land is condemned or flooded, or whether it is restricted by regulation to

use in its natural state, if the effect in both cases is to deprive him of all beneficial use of it." *San Diego Gas & Elec. Co.* v. *City of San Diego*, 450 U.S. 621, 652 (1981) (Brennan, J., dissenting).

Thus, even though the CRMC would have been obliged to compensate Mr. Palazzolo if it had formally condemned his property, and even though to all intents and purposes it *has* condemned 18 acres of Mr. Palazzolo's land for use as a wildlife refuge, the Rhode Island Supreme Court says he gets no compensation. Yet his land is little or no more valuable to him now than if it had been condemned outright. Rhode Island should not be able to circumvent its obligation to pay just compensation by relying on wetlands instead of condemnation statutes.

The fact that the agency left Mr. Palazzolo with a dry spot on which to build a solitary house should not alter the legal analysis. In a formal condemnation, the government could not avoid paying compensation by seizing all of a house except the bathroom. The law should be no different when the government seizes most of an owner's land by regulation. The lack of any requirement in the Fifth Amendment that the government eradicate the owner's *entire* property interest before paying compensation was not an oversight. Everyone at the time, including the Framers, knew that if the government were to take a portion of Mt. Vernon to build a military barracks, George Washington would be entitled to compensation for the value of the portion taken. See *Bauman* v. *Ross*, 167 U.S. 548, 573, 575-582 (1897) (discussing states' historical practice of providing compensation "for taking part of a parcel of land" by eminent domain). The result should not differ simply because the governmental purpose is protecting wildlife and the government wields its regulatory rather than formal condemnation power.

Traditional property concepts illuminate the substance of the governmental encroachment here. By refusing to permit Mr. Palazzolo to make any reasonable economic use of his property,

the CRMC has effectively imposed a negative easement on it. See *Dolan*, 512 U.S. at 394 (requirement to dedicate public greenway space amounted to "a permanent recreational easement"); *Lucas*, 505 U.S. at 1019 (recognizing "the practical equivalence [of] negative regulation and appropriation"); *Nollan*, 483 U.S. at 831 (if government "wants an easement across the Nollans' property, it must pay for it"). The Takings Clause compels Rhode Island to fully compensate Mr. Palazzolo for that negative easement. If a one-half-inch cable across a property owner's roof is a compensable taking (*Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 438 (1982)), and the same is true of a narrow public easement across beachfront property (*Nollan*, 483 U.S. at 841) and of government flights over chicken farms (*United States* v. *Causby*, 328 U.S. 256, 261-262 (1946)), denying compensation where regulation has rendered land almost completely useless for all practical purposes defies both common sense and basic justice.

C. The Consequences Of The Decision Below Are Absurd And Carry Heavy Social Costs.

The absolutist position of the Rhode Island Supreme Court would lead to absurd results. *Lucas* provides a ready illustration. This Court held that South Carolina's refusal to allow Mr. Lucas to build single-family homes deprived his beachfront property of all economic value and categorically effected a taking. But what if the government had left him free to place a souvenir stand on a tiny corner of his land? Based on the Rhode Island Supreme Court's decision in this case, Mr. Lucas' property would have retained *some* economic value and he would not have suffered a categorical taking. That cannot be right. If the *Lucas* decision hinged on whether he could set up a souvenir stand, government agencies could too easily circumvent the compensation requirement by leaving a small spot on a targeted property free from otherwise confiscatory regulation.

Or suppose that Smith owns 10 acres of land adjacent to Jones' 11 acres, and that a state agency requires 20 acres of wetlands (10 each from Smith and Jones) to remain undeveloped because it provides habitat for wildlife and includes wetlands. Smith and Jones each have had 10 acres of land rendered worthless. But if the Rhode Island Supreme Court is right, the agency categorically took Smith's 10 acres but not Jones' 10 acres. That cannot be the law if compensation is to be "just," as the Constitution requires.

The unfairness of the decision below is compounded by the strategic gamesmanship that it is certain to engender, which would harm not only individual landowners like Mr. Palazzolo but the public as a whole. This Court in *Lucas* recognized that permit denials of the type at issue are often based on hidden agendas and not the public good, noting that regulations "requiring land to be left substantially in its natural state [suggest] that private property is being pressed into some form of public service under the guise of mitigating serious public harm." 505 U.S. at 1018. A rule that allows government to regulate almost all the value out of an owner's land without paying compensation is bound to encourage strategic behavior and regulatory overreaching. A city could obtain parks for free under that approach simply by leaving burdened owners with tiny remnants of their land. Or an agency seeking to transform private residentially zoned land into a wildlife refuge, but unable to obtain voter approval for the large expenditure required to purchase or formally condemn the land, could accomplish its purpose by regulatory fiat, avoiding compensation by leaving the owner with control over a fragment. If an agency were free to ride roughshod over the will of the voting public in such fashion, the Takings Clause would be rendered toothless and democracy meaningless.

Such a regime also would enable government bureaucrats to curry favor among property owners by disproportionately directing the impact of regulations to less favored sectors of the citizenry without incurring the costs mandated by the Constitution. Governments could reward favored voters by providing amenities without raising taxes, simply by targeting land use regulations to portions of the properties of less favored landowners. "[A]djusting the benefits and burdens of economic life" is one thing (*Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978)), but seizing from one and bestowing on another is something else again. See *United States* v. *Security Indus. Bank*, 459 U.S. 70, 78 (1982) (Takings Clause protects against "a general economic regulation which in effect transfers the property interest from a private [party] to a private [party]"). In this case, the decision of the Rhode Island courts that Mr. Palazzolo's right to compensation is defeated by the presence of a supposedly developable dry spot on his land exemplifies the risk of reckless regulation inherent in its approach.

The holding below, that only 100 percent devaluations can be categorical takings, also would encourage property owners to engage in costly and unproductive transactional ploys. For example, if Mr. Palazzolo had sold off the uplands on his property to a confederate—or had bought the upland and wetland parcels separately, with ownership held in separate corporate vehicles—he would presumably have been eligible, if the Rhode Island Supreme Court is right, to prosecute a categorical taking claim. Such transactional maneuvering would be socially costly as well as individually unjust. See Rose, Mahon *Reconstructed: Why the Takings Issue is Still a Muddle*, 57 S. CAL. L. REV. 561, 568 (1984) (warning that misapplication of the Takings Clause "may cause owners to make elaborate and socially useless splits of their property rights"). The Framers did not intend, when they gave constitutional protection to the ownership of property, to encourage games subject to manipulation by the government or property owners.

To the contrary, the Takings Clause was intended both to guard against unfair and discriminatory conduct and to discourage governments from treating private property as a free good and

thereby wasting resources. If Rhode Island knows it must pay for the land it covets for wildlife and flood control, it will have to fully account for its own resources and those of all its citizens and property owners. Such accountable decisionmaking, in addition to its more general benefits, would comport with the Constitution.

The Takings Clause, after all, subjects governmental regulation "to the dictates of 'justice and fairness.'" *Andrus* v. *Allard*, 444 U.S. 51, 65-66 (1979). However much the government may desire to leave Mr. Palazzolo's land wet and undeveloped, there are "outer limits" to how "laudable" goals may be achieved. *Dolan*, 512 U.S. at 396. Even "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal*, 260 U.S. at 415-416; see also *Kaiser Aetna*, 444 U.S. at 180 (government's plan to make private pond into "public aquatic park" required just compensation to pond owner). In this case, forcing Mr. Palazzolo to forfeit all or almost all the value of his property to benefit the environment would unconstitutionally force him "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). Reversing the decision below will permit the Takings Clause to continue to "stand as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980).

D. Even If The State's Taking Was Not Categorical, The Severe Economic Impact On Mr. Palazzolo Entitles Him To Just Compensation.

Based on its faulty "reasonable expectations" ruling (see *supra* Part I), the Rhode Island Supreme Court never analyzed the economic impact on Mr. Palazzolo of the CRMC's permit denial. But even if the record were sufficient to establish that Mr. Palazzolo's land retains enough value to preclude a categorical

taking, the government's action sufficiently diminished its value to constitute a taking under this court's *ad hoc* approach to takings analysis, in which economic impact is a critical factor. See, *e.g.*, *Eastern Enters.* v. *Apfel*, 524 U.S. 498, 523 (1998).

The economic impact on Mr. Palazzolo from being forced to leave almost all of his land undeveloped is, by any token, significant. Before the permit denial, he expected to earn $3,150,000 in profits from developing his long-subdivided land. After the denial, he can obtain (at most, based on the speculative opinion below) $357,000. That loss of at least $2.79 million—some 89% of his projected return—represents an economic impact more than sufficient to trigger the just compensation requirement. See *Dolan*, 512 U.S. at 380 (city's forced dedication of 10 per cent of petitioner's land for public recreational use was a taking); *Hodel* v. *Irving*, 481 U.S. 704, 714 (1987) (taking of property interests worth less than $2000 may have "substantial" economic impact because "[t]hese are not trivial sums"); *Florida Rock*, 18 F.3d at 1567-1569 (60% reduction in value of land was enough for a taking); *Yancey* v. *United States*, 915 F.2d 1534, 1543 (Fed. Cir. 1990) (77% diminution in value).

And even if the proper measure of economic impact would compare any residual value of his land to its fair market value if filled and awaiting development, the economic impact still would plainly be very substantial, although determining the precise amount would require further proceedings below.

Mr. Palazzolo has been trying to develop his property for over 40 years, and he filed this case well over 12 years ago. The slow pace of takings cases, generally to the advantage of (if not caused by) the government defendants, unduly obstructs the prosecution of many valid claims. The authors of the Takings Clause certainly did not intend the denial of justice by delay, and amici submit that this case presents an appropriate opportunity for this Court to draw attention to this widespread problem. Mr. Palazzolo, unlike Mr.

Carstone in the *Jarndyce* case, should obtain any just compensation to which he is entitled in this lifetime, not "through disposition by the Lord." *Scales* v. *United States*, 360 U.S. 924, 926 (1959) (Jackson, J.).

CONCLUSION

For the foregoing reasons, the judgment of the Rhode Island Supreme Court should be reversed.

Respectfully submitted.

JOHN J. RADEMACHER
General Counsel
American Farm Bureau Federation
225 Touhy Avenue
Park Ridge, Illinois 60068
(847) 685-8600

TIMOTHY S. BISHOP
Counsel of Record
JEFFREY W. SARLES
STEFFEN N. JOHNSON
Mayer, Brown & Platt
190 South LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

JOHN J. KUPA
The Meadows Professional Office Building
1130 Ten Rod Road
North Kingstown,
Rhode Island 02852
(401) 294-5566

Counsel for the Amici Curiae

NOVEMBER 2000

NOV 24 2000

Supreme Court, U.S.
FILED
NOV 24 2000

No. 99 - 2047

In the
Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,
v.
RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of *Certiorari* to
the Supreme Court of Rhode Island

BRIEF OF *AMICI CURIÆ* W. FREDERICK WILLIAMS, III, AND LOUISE A. WILLIAMS ON THE MERITS IN SUPPORT OF PETITIONER

Counsel for Amici Curiæ MICHAEL E. MALAMUT,
Counsel of Record
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660
Facsimile: (617) 695-3656

QUESTIONS PRESENTED

The argument of *Amici* concentrates on Petitioner Anthony Palazzolo's first question presented:

1. Whether a regulatory takings claim is *categorically barred* whenever the enactment of the regulation predates the claimant's acquisition of the property?

The factual circumstances of *Amici*'s failed property development attempt, as set out in the Interest Section below, also shed light on Petitioner's second question presented:

2. Where a land-use agency has authoritatively denied a particular use of property and the owner alleges that such denial per se constitutes a regulatory taking, whether the owner must file additional applications seeking permission for "*less ambitious uses*" in order to ripen the takings claim?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIÆ* 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

ARGUMENT 5

I. BY TREATING PALAZZOLO MORE HARSHLY THAN HIS RELATED PREDECESSOR IN TITLE IN REGARD TO HIS PROPERTY DEVELOPMENT RIGHTS, THE RHODE ISLAND SUPREME COURT FAILED TO TAKE INTO ACCOUNT ADVERSE PUBLIC POLICY IMPLICATIONS 5

II. THE POST-ENACTMENT PURCHASER SHOULD BE COMPENSATED FOR REGULATORY TAKINGS AFTER REJECTION OF A DEVELOPMENT APPLICATION 15

CONCLUSION 20

APPENDIX 21

PROVIDENCE JOURNAL, May 31, 1994 ... Am. App. 1

WALL STREET JOURNAL, Dec. 30, 1994 .. Am. App. 4

Purchase & Sale Agreemt., Aug. 13, 1986 Am. App. 5

Deed, Sept. 4, 1986 ..... Am. App. 16

Septic Sys. Approval, Sept. 30, 1986 ... Am. App. 18

Cert. of Conformance, Dec. 12, 1988 ... Am. App. 19

TABLE OF AUTHORITIES

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 17

Board of County Supervisors v. United States, 48 F.3d 520 (4th Cir.), *cert. denied*, 516 U.S. 812 (1995) 14

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) 3, 6, 17

Iglehart v. Iglehart, 204 U.S. 478 (1907) 14

In re Kellogg, 197 F.3d 1116 (11th Cir. 1999) 6

Lopes v. City of Peabody, 507 U.S. 981 (1993) 7

Lopes v. City of Peabody, 417 Mass. 299, 629 N.E.2d 1312 (1994) 7, 8

Lopes v. City of Peabody, 430 Mass. 305, 718 N.E.2d 846 (1999) 8

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7, 18

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 6, 7

Palazzolo v. State, 746 A.2d 707 (R.I.), *cert. granted*, 121 S. Ct. 296 (2000) 3, 5, 6, 7, 8, 11, 12

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 16

Steinbergh v. City of Cambridge, 413 Mass. 736, 604 N.E.2d 1269 (1992), *cert. denied*, 508 U.S. 909 (1993) 8

Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 11, 12, 17, 18

CONSTITUTION

U.S. CONST. amend. V .....

U.S. CONST. amend. XIV .....

STATUTES

R.I.G.L. 1956 tit. 46, c. 23 5

R.I.G.L. 1956 §§ 2-1-13 through 2-1-17 5

R.I.P.L. 1971, c. 279, § 1 5

R.I.P.L. 1965, c. 140, §1 5

OTHER AUTHORITIES

GRAHAM BANNOCK *ET AL.*, *DICTIONARY OF ECONOMICS* (1998 ed.) 11

THE ECONOMIST, *ECONOMICS* (1999) 5, 11, 13

8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (2d ed. 1937) 16

3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* (O.W. Holmes, Jr., ed., 12th ed. 1873) 16

Durham, *Efficient Just Compensation as a Limit on Eminent Domain*, 69 MINN. L. REV. 1277 (1985) 17

Gregg Easterbrook, *Suburban Myth*, NEW REPUBLIC, Mar. 15, 1999, at 18 15

Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125 (1992) 18

William A. Fischel, *Eminent Domain and Just Compensation, in* 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 34 (Peter Newman ed., 1998) 18

Bruce Katz & Jennifer Bradley, *Divided We Sprawl*, ATLANTIC MONTHLY, Dec., 1999, at 26 15

Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89 (2000) .. 11, 13, 14, 15, 16, 17

No. 99 - 2047

In the
Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,
v.
RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer,
and COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of *Certiorari* to
the Supreme Court of Rhode Island

BRIEF OF *AMICI CURIÆ* W. FREDERICK WILLIAMS, III, AND LOUISE A. WILLIAMS ON THE MERITS IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIÆ*

Amici W. Frederick Williams, III, and Louise A. Williams own five acres in Little Compton, Rhode Island.[1] *See Amici* Appendix ("Am. App.") at 1. Their unsuccessful efforts to build a home for themselves there has garnered attention in both local and national media.[2] Their property, which contains

---

1 Pursuant to Supreme Court Rule 37.6, counsel for *Amici* state that counsel for neither Petitioner nor Respondent authored this brief in whole or in part and no person or entity other than *Amici* made a monetary contribution to the preparation or submission of the brief.

2 Copies of articles from the Wall Street Journal and the Providence Journal are included in the Appendix to this Brief. The Appendix also includes a copies of the Purchase and Sale Agreement and Deed for the Property; the September 30, 1986, Septic System Approval; and the

freshwater wetlands, is subject to regulation by the Rhode Island Department of Environmental Management ("DEM") in a manner similar to that by which coastal wetlands (such as those at issue in this case) are regulated by the Rhode Island Coastal Resources Management Council ("CRMC"). The Williamses purchased their property in 1986, after the DEM wetlands regulations were adopted. Am. App. 16. DEM regulates not only freshwater wetlands, but also installation of septic systems, and it granted the Williamses a permit to build a septic system. Am. App. at 3, 18–19. Because DEM septic officials failed to inform the Williamses that their property also needed to pass wetlands review before they could commence building, in 1988 the Williamses built a septic system and foundation on their land. *Id.* at 3–4. After the foundation and septic system were complete, DEM issued an order under its wetlands jurisdiction requiring the construction to be ripped out and the property to be restored to its condition in 1971, when DEM acquired its wetlands jurisdiction. *Id.*[3] The Williamses were unsuccessful in their court challenge to the DEM rulings. *Williams v. Durfee,* C.A. No. PC 92-1216 (Providence, R.I., Super. Ct. July 6, 1993), *cert. denied,* S.C. No. 93-503-M.P. (R.I. Feb. 24, 1994).

After the DEM's restoration order, the approximate value of the Williamses' property plummeted from $260,000 to $30,000. Am. App. at 4. The Williamses estimated that their total expenses on the property between 1988 and 1994,

---

December 12, 1988, Septic System Certificate of Conformance.

3 Ironically, in this case CRMC urges that Palazzolo should have applied first to DEM for a septic system permit before applying to CRMC to fill wetlands. Respondents' Memorandum in Opposition to Petition for Writ of *Certiorari* at 18. Following CRMC's suggested order resulted in the Williamses forced removal of their own septic system.

including lost property value, legal expenses, building materials, restoration costs, professional expenses in preparing site development plans, came to more than $300,000. *Id.* Although they and their advisors had several meetings with government officials, they only submitted one formal building plan to DEM. Given the expense they have already incurred, they cannot afford to prepare another application to DEM consisting of "less ambitious development plans." *See Palazzolo v. State,* 746 A.2d 707, 714 (R.I.), *cert. granted,* 121 S. Ct. 296 (2000).[4] This is particularly so in light of the fact that, unlike the decisions of the development agency in *City of Monterey v. Del Monte Dunes, Ltd.,*[5] DEM's order gave the Williamses no idea whether and to what extent they could build anything elsewhere on their lot. Without guidance from the regulatory agency, the Williamses are in no position to expend the additional tens of thousands of dollars it would cost for them to make another attempt at securing development permission from DEM. *See* Am. App. at 1. In view of the Williamses' difficulties with DEM, they cannot find a buyer willing to take the property from them for a reasonable return on their investment. Rather than enjoying a home in a tranquil setting, they are instead prisoners of their own property, spending money maintaining (in the manner required by DEM)

---

4 As small property owners attempting to build their own primary residence on the site, the Williamses similarly cannot "bid against themselves" by presenting ever less ambitious plans until the agency accepts one (in the meanwhile perhaps waiving well founded rights to more ambitious development). In order to receive their reasonable investment-backed expectations for their property, they need to be able to build a comfortable home for themselves on the site. Development plans cannot be more basic than that.

5 526 U.S. 687 (1999).

land that they can neither use nor sell. *Id.* at 3–4.

Amici seek to bring to the Court's attention their views, and the views of other similarly situated small property owners, concerning the scope of the takings clause under the Fifth Amendment to the United States Constitution. If the decision below is not reversed, under the "post-enactment purchaser" theory espoused by the Rhode Island Supreme Court, property owners who are unable to develop their own property when a confiscatory regulation is passed will be forced to bring litigation before the area is ready for development or to sell at a steep discount. People like the Williamses who inadvertently bought property that is virtually undevelopable under current regulatory schemes will have no chance to build their much anticipated retirement homes. These issues are of significance to *Amici* as well as to property owners generally. *Amici* believe that this brief may provide an additional perspective which may aid the Court in considering the issues raised by this case.

Pursuant to Supreme Court Rule 37.2, counsel for *Amici* have secured written consent for the filing of this brief from counsel for Petitioner and Respondent.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case contained in the Brief of the Petitioner, Anthony Palazzolo ("Palazzolo").

SUMMARY OF ARGUMENT

Amici contend that a purchaser of property should not be penalized by prohibiting him or her from challenging a regulation that pre-dated the purchase, because such a theory distorts the incentives for the property's development (pp. 5–15). Moreover, awarding takings damages to post-enactment purchasers is the most efficient means of responding to inequities in development regulations (pp. 15–19).

ARGUMENT

I. BY TREATING PALAZZOLO MORE HARSHLY THAN HIS RELATED PREDECESSOR IN TITLE IN REGARD TO HIS PROPERTY DEVELOPMENT RIGHTS, THE RHODE ISLAND SUPREME COURT FAILED TO TAKE INTO ACCOUNT ADVERSE PUBLIC POLICY IMPLICATIONS.

The 1971 statute establishing CRMC[6] and CRMC's 1977 enforcement regulations were in effect when Palazzolo acquired his property by operation of law in 1978 upon the dissolution of his solely owned corporation Shore Gardens, Inc. ("SGI"). *Palazzolo,* 746 A.2d at 710–11. CRMC determined that Palazzolo could not fill the eighteen wetland acres on his property, but instead could only build a single home on the small upland portion of the lot. *Palazzolo,* 746 A.2d at 714.[7] By virtue of the fortuity that the SGI corporate dissolution occurred after the passage of the CRMC enabling legislation rather than before, the Rhode Island Supreme Court decided

---

6 R.I.P.L. 1971, c. 279, § 1, codified as R.I.G.L. 1956 tit. 46, c. 23. A predecessor statute was enacted in 1965. R.I.P.L. 1965, c. 140, §1, codified as R.I.G.L. 1956 §§ 2-1-13 through 2-1-17. *See Palazzolo,* 746 A.2d at 710. Although not relevant in this case, the Rhode Island Supreme Court mentions the prior statute as though the initiation of any property regulation should put owners on notice of potentially more stringent future administrative or statutory regimes and therefore prevent them from challenging such future regulatory changes. That would constitute unnecessary official acceptance of the unsavory, and as yet unproven, theory that jurisdiction of governmental departments inevitably expands as self-interested bureaucrats seek to enlarge their funding and authority. *See* THE ECONOMIST, *ECONOMICS* 161–62 (1999).

7 Palazzolo was also denied permission to fill only 11.4 acres of wetlands to create a commercial recreational facility. Palazzolo's Petition for *Certiorari* ("P. Pet.") at 14 n.4.

that Palazzolo's investment-backed expectations in his property were not reasonable and that he was not deprived of all beneficial use of his property by CRMC's determinations. *Palazzolo*, 746 A.2d at 715–17.

This "post-enactment purchaser" theory[8]—that a purchaser on notice of a regulation cannot contest the validity of the regulation—has been disparaged by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), which indicated that property owners' rights should not be altered "because they acquired the land well after the [regulatory] commission had begun to implement its policy." *Id.* In *Del Monte Dunes*, this Court recently upheld a verdict in a regulatory takings case in favor of a developer who purchased the property in question towards the end of the regulatory application process without comment on the "post-enactment purchaser" theory.

Certainly, it is circular to insist that a purchaser loses all right to challenge a regulation simply because he or she is aware at the time of purchase that the regulation *may* be found valid. That is like saying that if someone purchases a home subject to a lien imposed without the knowledge or permission of the prior owner, the purchaser is prohibited from contesting the lien (as opposed to simply his notice of it), no matter how invalid, simply because he had record knowledge of it before buying the

8 As demonstrated in this case, the phrase "post-enactment purchaser" may not be the most accurate encapsulation of the theory, as Palazzolo acquired his property by operation of law, not by purchase. The theory is also referred to as the "coming to the regulation" theory and is often treated as an aspect of the "self-created hardship" doctrine derived from zoning law. *See In re Kellogg*, 197 F.3d 1116, 1121 n.4 (11th Cir. 1999) (concerning "self-created hardship" doctrine).

property. Nevertheless, several courts[9] have adopted the "post-enactment purchaser" theory, contrary to the clear implications of this Court's holdings in *Nollan* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Supreme Judicial Court of Rhode Island's neighboring state Massachusetts, on the other hand, rejected the "post-enactment purchaser" theory in *Lopes v. City of Peabody*, 417 Mass. 299, 629 N.E.2d 1312 (1994). *Lopes* was decided in light of *Lucas* on remand from this Court. *Lopes v. City of Peabody*, 507 U.S. 981 (1993); *Lopes*, 417 Mass. at 300 n.2, 629 N.E.2d at 1313 n.2. The Massachusetts court held:

> [T]he validity of the ordinance is before us, and [the property owner], a purchaser of land subject to the restriction at the time of his purchase, has every right to challenge the continued application of the restriction. We see no reason to permit challenges to the validity of a zoning enactment only by those landowners who owned land when the zoning provision first affected it. A rule that a purchaser of real estate takes subject to all existing zoning provisions without any right to challenge any of them would threaten the free transferability of real estate, ignore the possible effect of changed circumstances, and tend to press owners to bring actions challenging any zoning provision of doubtful validity before selling their property. Moreover, such a rule of law would in time lead to a crazy-quilt pattern of the enforceability of a zoning law intended to have uniform applicability.

Lopes, 417 Mass. at 302–03, 629 N.E.2d at 1314–15 (citation

9 *See Palazzolo*, 746 A.2d at 716–17.

omitted).[10]

The absurdity of denying relief to a new property owner who "comes to the regulation" is demonstrated in this case, where Palazzolo acquired the wetland property by action of law upon dissolution of SGI. *Palazzolo,* 746 A.2d at 717. His situation is similar to an heir to an individual decedent, who, under the "post-enactment *purchaser*" theory, would also lose the right to challenge pre-acquisition regulations when the decedent had not been able to develop his property before he died. The Rhode Island Supreme Court dismisses this concern—that all those who acquire property after passage of a regulation are treated similarly, regardless of how the property was acquired—in a footnote. *Palazzolo,* 746 A.2d at 717 n.9. Yet this concern about whose investment backed expectations are at stake illustrates the policy weakness of the "post-enactment purchaser" theory, as discussed in greater detail below. If "coming to the regulation" were a reason to deny Palazzolo the right to develop the wetland property that SGI could have developed, then Palazzolo lost an important and

10 The Massachusetts Supreme Judicial Court in *Lopes* decided only that the "post-enactment purchaser" theory did not apply to challenges to validity of zoning regulations. The court reserved decision on the applicability of the "post-enactment purchaser" theory to takings damages claims, although it posited no reason why its logical position would not apply in the damages area as well. *See Lopes,* 417 Mass. at 302–03 n.7, 629 N.E.2d at 1314 n.7; *Steinbergh v. City of Cambridge,* 413 Mass. 736, 742–43, 604 N.E.2d 1269, 1274 (1992), *cert. denied,* 508 U.S. 909 (1993). In a subsequent decision in a related case, the Supreme Judicial Court affirmed in part a temporary takings damages award for the post-enactment purchaser on other grounds without discussing the "post-enactment purchaser" theory. *Lopes v. City of Peabody,* 430 Mass. 305, 307 n.4, 310, 718 N.E.2d 846, 849 n.4, 850–51 (1999).

valuable property development right simply even though it no longer made economic sense for him to keep up the legal fiction of corporate ownership. The corporate form, while often useful in appropriate circumstances, carries inherent economic inefficiencies in the form of the monetary and time costs of filing fees and paperwork, often requiring professional assistance from lawyers and accountants. In the case of sole owners, such as Palazzolo or the Williamses, the expenses of maintaining the corporate form may often outweigh the benefits conveyed by corporate status.

If, however, Palazzolo had been aware in 1978 that the Rhode Island Supreme Court would adopt the "post-enactment purchaser" theory, he could have taken precautions to avoid the dissolution of SGI and retained ownership of the property under the SGI form (with its inherent expenses) until development of the property had begun. The transfer from SGI to Palazzolo occurred by act of law. It made sense in economic terms to the do away with the corporate fiction. The economic calculus would have been very different if development rights were made dependent on it. The Williamses structured the purchase of their property so that the sale was contingent on septic approval (which they received), but their counsel was not sufficiently astute to make the sale contingent on actual buildability. *See* Am. App. 14 (Purchase and Sale Agreement ¶¶ 25–26). They suffered, while a large-scale developer with higher-powered legal counsel might have arranged for the pre-enactment owner to retain legal ownership of the property and act as a figurehead by applying for all permits under his own name until after the property had been completely developed. In the meanwhile, the purchaser could have been empowered to direct and fund the development and act in all respects as the true owner, while agreeing to indemnify the prior owner for any potential liability of his nominal "ownership."

Thus, a large developer with a skillful attorney could eviscerate the effect of the "post-enactment purchaser" theory for land in corporate ownership through legal fictions including mergers, consolidations, stock transfers, formation of subsidiaries, and corporate divisions. For example, investors in a real estate company that only owned one proposed subdivision could evade the "post-enactment purchaser" theory by transferring their stock to a new purchaser, rather than transferring the real estate. It is ironic that Palazzolo, the successor by law to a solely owned corporation, stands in a worse position under the Rhode Island Supreme Court's decision than a complete stranger would if he had purchased all the stock in SGI from Palazzolo and continued to maintain the corporate fiction. The "post-enactment purchaser" theory would thus invite litigation over the form of the transaction, the nature of the transfers, and the effect of partial transfers (for instance a new investor buying out the partner of a continuing investor).

The "post-enactment purchaser" theory would also disadvantage individual property owners and small-scale developers, such as the Williamses and Palazzolo, who would not be able to utilize sophisticated transactions to protect their development rights. Acceptance of the "post-enactment purchaser" theory would constitute a massive uncompensated taking from small property owners like Palazzolo and the Williamses, while at the same time preserving the development rights of large corporations with perpetual existence. Property owners interested in retaining their development rights would gradually form otherwise unnecessary corporations or sell out to large property development corporations with the resources to manipulate the corporate form as needed to ensure development rights are preserved. The percentage of undeveloped, but developable, property in the hands of large

corporations would increase, making it more difficult for individuals like the Williamses to develop their own property affordably at their own pace. Over time, these effects could have a massive impact on American property ownership patterns and decrease considerably the availability of affordable single-family housing sites.

Although the Rhode Island Supreme Court ignored these powerful policy reasons against the "post-enactment purchaser" theory, it opined that enforcement of the theory was necessary to prevent speculation. *Palazzolo*, 746 A.2d at 716.[11] The

---

11 A recent commentator voiced similar moral disapproval of post-enactment purchasers' "gambling" on the outcome of their post-purchase development proposals. Gregory M. Stein, *Who Gets the Takings Claim? Changes in Land Use Law, Pre-Enactment Owners, and Post-Enactment Buyers*, 61 OHIO ST. L.J. 89, 99–100, 118 (2000). In purely economic terms, however, "speculation" is an inherent motivating factor for any form of investment, whether in stocks, education, or real estate. GRAHAM BANNOCK *ET AL.*, *DICTIONARY OF ECONOMICS* 389 (1998 ed.) ("**speculative motive** The reason which causes people or firms to hold a stock of money in the belief that a capital gain or the avoidance of a loss can be achieved by so doing. It is one of three motives for holding money outlined by [John Maynard] Keynes." (emphasis in original)); THE ECONOMIST, *supra* note 6, at 278–83 (by incorporating opposing views into asset price, speculators provide a valuable economic service). Thus, all property ownership, being a major form of investment, is to a certain extent speculative. It is only in the context of litigation that "speculation" causes concerns because uncertainty about future prospects can lead to highly inaccurate estimations of value and, therefore, unjust recoveries. Under the ripeness doctrine of *Williamson County* and its progeny, however, the uncertainty inherent in a real estate investor's "speculative" purchase price is long past; instead, the courts can evaluate the potential value of the investor's concrete development proposal. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985).

Rhode Island Supreme Court feared that individuals would purchase land severely limited by environmental restrictions solely to seek compensation for regulatory takings. *Id.* This concern is, however, overstated in light of current regulatory takings ripeness doctrine. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). In order to succeed in a takings claim, a property owner must first request regulatory approval for a development plan. As the Williamses can attest, there is considerable expense involved in preparing development plans and applying for their approval, even for a single family home. Am. App. at 1, 4. Given the unpredictable nature and expense of litigation and the prerequisite of prior application for regulatory approval, it is unlikely that a significant number of such purely "speculative" cases will be brought. On the other hand, if takings compensation is denied to post-enactment purchasers, great injustices will be caused to pre-enactment owners (whose sale prices will be considerably reduced) and post-enactment purchasers (who are denied compensation when, by fortuity, the properties they seek to develop were owned by individuals, who have to sell the land itself, instead of corporations, which could simply sell shares).

In addition to its potential for spawning legal fictions and litigation, the "post-enactment purchaser" theory loses its superficial substantive appeal when its underlying premises are examined in light of economic principles. As a property owner's claim that a regulation constitutes a taking is not ripe until the property owner is denied the right to develop, the "post-enactment purchaser" theory puts owners of undeveloped property in an awkward position. *See Williamson County*, 473 U.S. at 186, 195. The theory is contrary to sound public policy because it would produce unwarranted distortions in property ownership and development patterns and cause unnecessary

erosion of transparency in property ownership and development records.[12]

The owners of undeveloped property under a "post-enactment purchaser" regime are in a Catch-22 when a regulation restricting development is passed. The property owners cannot challenge the regulation until they are ready to develop the property and are denied a development permit, even if the regulation would clearly constitute a taking. An owner without adequate capital to develop immediately after the regulation is adopted is in a difficult position. The owner may not want or be able to face the time, expense, uncertainty, and exasperation of challenging the regulation. In such case, under a "post-enactment purchaser" theory regime, the value of the property to the owner is effectively reduced to zero. Without such a restriction, the pre-enactment owner could sell at a modest discount to someone else willing to take on the development challenge, because the purchaser would retain the same right to challenge the regulation.[13] On the other hand, under the "post-enactment purchaser" theory, an owner unwilling or unable to develop the property must either sell to someone else at a steep discount to cover the purchaser's loss

---

12 For the importance of transparency in economic systems, see THE ECONOMIST, *supra* note 6, at 209.

13 For a detailed discussion of the economic calculus that pre-enactment owners and post-enactment purchasers go through in determining the appropriate post-enactment sales price discount, see Stein, *supra* note 11, at 107–08, 120–21. Under this system, part of the bundle of rights that the post-enactment purchaser acquires from the pre-enactment owner is the right to challenge the validity of development regulations. *Id.* at 107. The right to challenge the validity of the regulation would thus follow the land. *Id.*

of development rights or retain the property until such time as he or she is finally able to raise the capital to develop the property, regardless of other potentially more beneficial ways that the owners might want to use their capital.[14] This disincentive to sell at a fair price under the "post-enactment purchaser" theory is in the nature of a long-disfavored restraint on alienation of property. *See Iglehart v. Iglehart,* 204 U.S. 478, 484 (1907); *Board of County Supervisors v. United States,* 48 F.3d 520, 526 (4th Cir.), *cert. denied,* 516 U.S. 812 (1995).

On the other hand, an owner with adequate capital at the time the regulation is passed may have an incentive to seek to develop the property immediately, so as to receive the benefits of the regulatory challenge (the recognition of his or her development rights) when he or she is capable of exercising those rights and before future uncertainties take their toll on the owner's ability to develop the property. Without a "post-enactment purchaser" rule, an owner might prefer to hold property thinking that in the long run the surrounding area will grow and development of the property will be warranted. At that time, assuming the area has grown, ordinarily the owner could then develop the property or sell the property to a developer who would retain whatever development rights the original owner had. If the "post-enactment purchaser" theory were applied, however, the property might well be developed prematurely because it is the only way for the owner to realize the benefits of a developed property (*i.e.,* higher value per square foot), as a subsequent purchaser (without the right to challenge the regulation) would not have the same development rights as the original owner. Since the surrounding area will not

14 For a discussion of the sharp loss in value to property owners under a "post-enactment purchaser" regime immediately after a development regulation is adopted, see Stein, *supra* note 11, at 99–100.

by then have grown out to the development, the price for the developed property will be lower than it would be in the future and may thus not be the best investment for the owner, nor the best use of the property at the time. This incentive for premature development would thus unnecessarily contribute to the suburban "sprawl" of leapfrogged development that has been much decried recently. *See, e.g.,* Gregg Easterbrook, *Suburban Myth,* NEW REPUBLIC, Mar. 15, 1999, at 18; Bruce Katz & Jennifer Bradley, *Divided We Sprawl,* ATLANTIC MONTHLY, Dec., 1999, at 26.

Thus, economic considerations and policy implications demonstrate that the incentives of a "post-enactment purchaser" theory regime would cost society a great deal in terms of lost openness, increased sprawl, inappropriate development, and lost investment value to small property owners. At the same time, the principal "benefit" of the "post-enactment purchaser" theory—that someone acquiring property with knowledge that it is affected by a regulatory scheme is prevented from challenging the regulation's overbreadth—can easily be evaded by clever maneuvering by large corporations with well paid legal staffs.

II. THE POST-ENACTMENT PURCHASER SHOULD BE COMPENSATED FOR REGULATORY TAKINGS AFTER REJECTION OF A DEVELOPMENT APPLICATION.

One recent commentator, after a wide-ranging discussion of the economic inequities of the "post-enactment purchaser" theory, suggests a novel approach to the issue. Professor Stein would bar post-enactment purchasers from compensation, but consider the pre-enactment owner to have a takings claim that ripens upon sale. Stein, *supra* note 11, at 130–31. Stein acknowledges that his proposal is economically equivalent to the more straightforward approach of allowing takings

compensation for post-enactment purchasers after rejection of a development proposal. *Id.* at 108–09. He suggests that his proposal is superior on two grounds: (1) courts are sometimes wary of allowing legal claims to be bought and sold; and (2) uncooperative or unavailable prior owners might be necessary to provide evidence of their own "reasonable investment-backed expectations." *Id.* at 109. *See Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124 (1978).

As to the first issue, while courts do look askance at some types of transfers of legal claims, particularly those that might unnecessarily stir up litigation, other types of claims transfer are well accepted in the law. For example, subrogation is a common and long-recognized method of transferring legal claims. *See* 8 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 204 (2d ed. 1937); 3 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* *123 n.1, 124 (O.W. Holmes, Jr., ed., 12th ed. 1873). Stein cites no good policy reason to discourage transfer of development rights claims that pass with the land.

As to the second issue, even if the investment-backed expectations of the pre-enactment owner were controlling, those expectations (required to be *reasonable*) could be established objectively by reference to the pre-enactment regulatory scheme and the development history of similarly situated neighboring properties. There is no reason that the post-enactment purchaser's reasonable investment-backed expectations should be discounted. While the post-enactment purchaser has some expectation that he may not be permitted to develop the property at all, absent adoption of the "post-enactment purchaser" theory, that result would generally be a low probability. It is far more likely that the post-enactment purchaser anticipated being able to develop the property or else he would not have purchased it. In fact, in light of the Fifth Amendment, it would be entirely reasonable for a post-

enactment purchaser to believe that he would be able to overturn an unjust property regulation when he was ready to develop the property. While the price he paid may be somewhat discounted because of the possibility of litigation over development, the non-discounted price (fair market value absent the challenged regulatory regime) can usually be determined by comparison with similarly situated neighboring properties developed under pre-enactment grandfathering protections.

Stein's proposal also fails to address adequately: (1) the impact of *Williamson County* and its progeny on the ripeness of pre-enactment owners' claims before property development is proposed; (2) the difficulty in ascertaining the value of the property taken by inverse condemnation without a development plan in place, which would require the hypothetical calculation of what the property would be worth in its current state with and without the regulation; and (3) the incentive his proposals give to governments to enact confiscatory property development regulations in the hope that pre-enactment owners (in particular small, unsophisticated property owners) will fail to enforce their rights upon sale, resulting in a small actual cost to the state for a major policy change at the expense of many pre-enactment owners. *See* Stein, *supra* note 11, at 93. *See also Armstrong v. United States,* 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar the Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."), *quoted in Del Monte Dunes,* 526 U.S. at 702; Durham, *Efficient Just Compensation as a Limit on Eminent Domain,* 69 MINN. L. REV. 1277, 1297, 1300–01 (1985) (under the "fiscal illusion," government entities underestimate costs of their actions unless required to include

such costs in their budgets); Daniel A. Farber, *Economic Analysis and Just Compensation,* 12 INT'L REV. L. & ECON. 125, 130 (1992) (economic theory predicts that externalities will produce overproduction of the product that does not absorb its true cost); William A. Fischel, *Eminent Domain and Just Compensation, in* 2 *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 34, 36 (Peter Newman ed., 1998) (concerning economic incentives for inefficient takings when government fails to consider societal costs).

Stein's proposal also fails to account for the encouragement it gives to litigation, potentially clogging the courts with difficult-to-assess pre-enactment purchaser takings claims. Under the Stein regime, the pre-enactment purchaser would almost inevitably be forced to sell at a steep discount and then take his or her chances with the courts on a regulatory takings claim. It is a far more efficient use of economic and litigation resources for the regulatory takings claim to pass with the property and allow the post-enactment purchaser to make a property development proposal when the land is most suitable for development. Under such a legal regime, pre-enactment owners would receive fair, market-based prices for their properties (with modest discounts reflecting the realistic probabilities of their properties' development). Inevitably, in many cases, the post-enactment purchaser's proposal would be approved, in whole or with minor revisions, and regulatory takings litigation would be superfluous. Professor Stein's proposal therefore ignores practical considerations as well as this Court's standing jurisprudence as developed in *Williamson County* and its progeny. This Court should utilize Stein's economic insights into the injustice of the "post-enactment purchaser" theory, while rejecting his impractical and novel proposal of takings damages for pre-enactment owners.

In light of this analysis and this Court's decision in *Lucas,*

a complete regulatory denial of any economically beneficial or productive use of property, such as Palazzolo's loss of the use of the wetlands at issue here or the Williamses' inability to build a single family home on their own five-acre property, should constitute a categorical taking regardless whether the property remains in the hands of the same owner who held the property when the regulation was passed. The "post-enactment purchaser" theory would promote legal fictions, encourage litigation, constitute a restraint on alienation, and stimulate premature development leading to unnecessary "sprawl." The policies behind the Fifth Amendment's protection of property ownership would be vitiated if original owners are prohibited from challenging regulations until they are ready to develop while subsequent owners are prevented from challenging regulations when the property is ready to be developed. The Court should reject the "post-enactment purchaser" theory in order to ensure fairness to property owners nationwide and to prevent government from imposing the costs of confiscatory regulation on some property owners alone—those who sell at a substantial discount in light of the legal regime as well as those (like the Williamses) who are trapped because they were unaware of the extent to which their property development rights were impaired by the existing regulatory scheme.

CONCLUSION

For the reasons stated above, this Court should reverse the Rhode Island Supreme Court and grant the Petitioner his requested relief.

Respectfully submitted,

W. FREDERICK WILLIAMS, III,
and
LOUISE A. WILLIAMS,

By their attorney,

Counsel for Amici Curiæ Michael E. Malamut
Counsel of Record
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111
Telephone: (617) 695-3660
Facsimile: (617) 695-3656

Dated: November 24, 2000

APPENDIX

The Providence Journal

OF THE Providence Journal-Bulletin: SINCE 1829 MASSACHUSETTS TUESDAY, MAY 31, 1994/ 4 75¢ WEEK BY CARRIER

Williams

MAY 31 94

BEST AVAILABLE COPY

Am. App. I

Wetlands rules their nightmare

■ A Massachusetts couple have had to dig up the septic system and the foundation for the house they planned to build in Little Compton.

By PETER LORD
Journal-Bulletin Staff Writer

When Louise A. and W. Frederick Williams III bought 5 acres to build a house amid the pastures and summer cottages of Little Compton six years ago, the concept of wetlands didn't mean much to them.

Now, the word "wetlands" conjures nightmares.

Because the state Department of Environmental Management ruled their property was wetlands, the Williamses last week had to rip up their house foundation and leaching field and plant trees so their land will revert to its natural state.

By their account, the Williamses have invested $78,000 in their land and $30,000 in building materials, paid $20,000 to a builder and spent more than $60,000 on legal fees — and all they have to show for it is a muddy hole along West Main Road and a lot of bitterness towards state environmental officials.

Believing they have been victimized by arrogant regulators, the Williamses have testified before a state Senate committee, written to every member of the General Assembly and had their story told in a national property-rights publication.

There is great dispute over the merits of the Williamses' case, but their story and others like it have helped prompt a low-key but concerted effort in the General Assembly to weaken Rhode Island's wetlands regulations.

A dozen bills are pending. Two of them would forbid DEM to pursue anon-

Turn to **WETLANDS**, *Page A-9*

Journal-Bulletin/ANDY DICKERMAN

PLANS HALTED: Louise Williams stands on her Little Compton property.

Wetlands

Continued from Page One

ymous tips of illegal actions. One would require that it prepare a report estimating the cost of every environmental decision. Another would allow construction within 10 feet of pristine wetlands; the limit is now 200 feet.

Environmentalists have responded by forming a coalition of 27 groups, filing some bills of their own and insisting they will compromise no more.

Both sides agree that the future of development in Rhode Island is at stake. With much of the state's dry, flat land already developed, builders are increasingly seeking to use wetlands.

Late last week, representatives of both sides of the issue said legislative leaders were telling them that none of the bills would pass. Instead, a special commission will be appointed to review the state's wetlands law and recommend changes to the General Assembly.

Rep. Edward J. Smith, D-Tiverton, chairman of the Joint Committee on the Environment, confirmed Friday that he and other leaders favor a commission. "The general consensus was the General Assembly, not being an authority on wetland issues, couldn't do anything on all this," he said.

Now, both sides are jockeying over the commission.

"We're not in favor of a commission at all," says Alison Walsh, issues coordinator at Save the Bay. "The other side is not being reasonable. They just don't want regulation. But we're not going to lie down anymore and compromise."

Ross Dagata, director of the Rhode Island Builders Association, said his members believe the state has gone too far with its wetlands policies and designated far too much land as wetlands.

Dagata said the builders plan to go ahead with a threatened lawsuit against a new set of wetlands regulations instituted two months ago. At the same time, Dagata said he's anxious to "sit down and work out a better law."

Wetlands are considered important for sponging up flood waters, recharging underground water supplies and providing wildlife habitat.

The question of just what constitutes a wetland is often subject to debate. While few disagree that streams and ponds are wetlands, biologists also denote as wetlands areas where the soil is soggy, or where certain plants grow that are common to areas that are periodically wet.

DEM rules substantially limit construction on or near wetlands. For instance, the law forbids building within 200 feet of a river or stream, but one bill would allow building within 10 feet.

Each year about 32 employees in DEM's Division of Wetlands process 600 to 700 applications to build near wetlands. Because their rulings can amount to a red light against building, their determinations can spell the difference between big money and a worthless piece of property.

The debate over protecting wetlands has reached the highest levels of state government.

In December, at a hearing on proposed new wetlands regulations, Lt. Gov. Robert A. Weygand and Joseph R. Paolino Jr., who at the time was director of the state Department of Economic Development, led critics opposed to further tightening of the state's wetlands regulations.

After some minor changes, DEM enacted the new rules.

But when Governor Sundlun fired DEM Director Louise Durfee last March, environmentalists were concerned that he was caving in to builders who thought she was enforcing wetlands laws too strictly. Sundlun quickly pledged that he wouldn't tamper with the new wetlands rules.

DEM changes training

The consequences of the debate over wetlands become startlingly real when you step on the lot where the Williamses just ripped out their foundation and septic system.

It appears to be very wet land. The ground is too soggy to cross without boots. Skunk cabbage and cattails grow right up to the edge of the foundation.

As Louise Williams supervised efforts to tear out the last vestiges of a house on her property, she couldn't hold back her anger.

She and her husband, both corporate executives, are used to doing things right, she said. They talked to the local building official, hired two local engineers and dealt regularly with DEM on their new septic system.

"DEM keeps saying we should have known there were wetlands,"

FROM PAGE ONE

Journal-Bulletin/ANDY DICKERMAN

JUST VISITING: Louise Williams walks through her Little Compton property, which she had hoped to call home.

she says. "But I'm not an engineer or an architect or a lawyer or a botanist. That's why we got professional people. This just isn't right. If you own 5 acres in the United States, you have the right to live on it."

Louise Williams insists that DEM's septic system inspectors visited her property several times and should have alerted her to the wetlands.

DEM officials now concede it would have been better if the inspectors sounded the alarm. But septic inspectors at the time focused just on septic systems, and were not trained to look at other problems. DEM now is providing broader training.

Catherine Robinson Hall, the lawyer representing DEM wetlands regulators, says Louise Williams neglected to mention that DEM, early on, advised her to consult DEM for a verification of the location of wetlands on the property. She never did, Hall said.

Dean Albro, chief of DEM's wetlands section, says that if the Williams case was at all marginal, DEM would have reached a compromise. But the land, he said, is saturated. Cattails grew out of the foundation after it was poured, he said.

The Williamses went through protracted hearings and administrative and legal appeals — that led ultimately to rejection by the Rhode Island Supreme Court.

The couple live in a condominium in Concord, Mass. Instead of moving to Little Compton, they just visit.

And instead of enjoying the "birds, flowers, gentle breezes and the hope of a peaceful refuge" that they described in one letter, they are left with bitterness.

"What has happened to us is that DEM strung us out until the legal costs are greater than the value of the property," says Mrs. Williams. "How does a citizen protect himself from a government agency that doesn't tell the truth, has deep pockets funded by the public, and can string you out forever? They are the king, they are the emperor."

THE WALL STREET JOURNAL.

A8 THE WALL STREET JOURNAL FRIDAY, DECEMBER 30, 1994

POLITICS & POLICY

Wider Property-Owner Compensation May Prove A Costly Clause in the 'Contract With America'

By CHRISTOPHER GEORGES
Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON — As congressional Republicans move to pare billions of dollars from existing government-benefit programs for the poor and the elderly, they may also be creating a costly new benefit program for another group: property owners.

As part of their "Contract with America," House Republicans would require the federal government to compensate private landowners or corporations when any federal regulation lowers the value of their property or company by 10% or more. The goal of the proposal is to put a stop to excessive government regulation. But the result could be a costly new drain on the Treasury.

"Yes, it seems skewed, but it's also a matter of fairness," says Roger Pilon of the conservative Cato Institute. "As the regulatory state has grown in leaps and bounds, property owners are losing huge amounts."

Movement to Lower Threshold

At issue are "property takings." When the government takes private property to build a road, for example, it must, in keeping with the Constitution's Fifth Amendment, compensate the owner for the value of that property. Traditionally, the courts have allowed compensation only in cases where government action wiped out all, or nearly all, of a property's value.

But the recent explosion in the number, breadth and cost of federal regulations — particularly in protecting wetlands, endangered species and worker safety — has triggered a movement to lower that threshold. That's because the recently enacted regulations frequently restrict property owners from building on, or even altering, their property. While those restrictions may not entirely wipe out the property's value, they frequently reduce it to a fraction of its former worth.

"Tens of thousands of people have been left with an illusion of ownership, but without the value of it," says Carol LeGrasse of the Property Rights Foundation of America.

Consider Louise and Frederick Williams, who say their Little Compton, R.I., property plummeted in value to less than $30,000 from $260,000, largely because of its categorization as wetlands. The Williamses, who in 1988 had started construction on a new home on the five-acre plot, were ordered by state environmental officials to tear down the partly built structure and, at their own expense, follow a precise 13-point property-restoration plan provided by regulators.

"Not only did we have to plant what they dictated," Mrs. Williams says, "but we had to make sure the trees were alive and well when they inspected them the next year. Maintaining our property the way they like it has been very expensive."

Mrs. Williams says that, including lost property value, lawyers' fees and other expenses, the regulations have cost them more than $300,000 over the past six years. "I've lost my faith and trust in government," she says.

'Out of Control' Regulation

Joining private landowners have been business leaders, who contend that the recent expansion in regulation in areas such as worker safety have burdened them unfairly. "The pendulum has swung too far," says Jack Faris, president of the National Federation of Independent Business. "Regulation is out of control."

Recent advances have come at both the state and federal levels. Since 1992, 12 states have passed some form of property-rights legislation. About the only recent setback came in November, when Arizona voters overturned a state law requiring state agencies to consider whether regulations constitute a taking.

Opponents of the legislation, primarily environmentalists, labor unions and local preservation organizations, argue that the compensation movement is really no more than a backdoor attempt, funded largely by big business, to gut environmental and other federal regulations. U.S. regulators, they say, who would be faced with paying out billions of dollars to enforce the law, would no doubt be less inclined to seek compliance. Lawmakers, too, would be more cautious about writing such laws in the first place.

Opponents also say that the plan would foist a heavy burden on the taxpayer. Although there are no firm estimates on how much the proposed law would cost the Treasury, a 1992 Congressional Budget Office study reported that it would take at least $10 billion to compensate owners of wetlands for lost property value.

"Republicans want a balanced budget, and then they propose a new multibillion-dollar entitlement program for property owners," says John Echeverria, counsel for the National Audubon Society. "How they reconcile the two I have no idea."

One answer comes from Peggy Reigle of the Fairness to Landowners Committee: "Welfare and food stamps are not protected under the Constitution. Property rights are."

As environmentalists and property owners trade barbs, the public appears to support both sides. Polls show that vast majorities consider themselves environmentalists and believe that the federal government does too little to protect the environment. At the same time, similar majorities also agree that there is not enough federal protection of property rights.

paying out billions of dollars to enforce the rights

Am. App. 4

AGREEMENT

THIS AGREEMENT entered into by and between WARD L. HAUCK of New York, New York and LOUISE G. CRIMMINS (f/k/a Louise G. Hauck) of Somers, New York

hereinafter called Seller, and W. FREDERICK WILLIAMS, III and LOUISE A. WILLIAMS of Concord, Massachusetts

hereinafter called Buyer:

WITNESSETH:

Seller agrees to sell and convey to Buyer certain real estate, hereinafter called the "premises", situated on the west side of West Main Road in Little Compton, Rhode Island and containing 5.2 acres, more or less and being further depicted as Lot 8 on Plat 7 of the Little Compton Tax Assessors' Records as presently constituted.

Conveyance is to be made subject to taxes assessed as of December 31, 1985 and to municipal zoning regulations if any.

The premises shall include all fixtures now annexed thereto or built in or fitted especially therefor and designed to be used and enjoyed in connection therewith, including, but not limited to, electric fixtures, heating and central air conditioning equipment, water heating equipment, screens, screen doors, storm windows, venetian blinds, window shades, curtain or drapery rods (but not curtains or drapes), awnings, trees, plants, shrubs, fences, outside television antennas and weather vanes, if any; but excluding, nevertheless, such of said fixtures, if any as are lawfully removable by tenants of Seller or leased from utility companies.

Am. App. 5

IN CONSIDERATION WHEREOF, Buyer agrees to purchase the premises, paying to Seller the sum of Seventy-Eight Thousand ($78,000.00)----------Dollars, of which Seven Thousand Eight Hundred ($7,800.00)----------Dollars, (hereinafter called the "Binder") has been paid this day, and the remainder of Seventy Thousand Two Hundred ($70,200.00)----------Dollars is to be paid upon delivery of the deed, as hereinafter provided.

IT IS MUTUALLY AGREED BY AND BETWEEN THE PARTIES HERETO THAT:

1. Seller shall convey the premises by a good and sufficient Warranty Deed of Seller in the usual form conveying a good, marketable and insurable title to the same, free from all encumbrances, to Buyer (or to the Nominee designated by Buyer if Buyer shall notify Seller of such designation in writing at least ten days prior to the time provided for the delivery of the deed).

2. The Deed shall be delivered and the consideration paid to the law offices of Leary and Holland, 1340 Main Road, Tiverton, Rhode Island on or before 10/17/86 at 2:30 o'clock P. M. unless full performances of said obligations shall have taken place prior to that time.

3. Seller shall deliver to Buyer, at the time of the delivery of the deed, full possession of the premises: (a) in the same condition in which they now are, reasonable use and wear of the buildings thereon and damage by fire or other hazards, insured against under Paragraph 4 hereof, excepted, (b) not in violation of zoning, subdivision, plat, building or minimum housing standards, restrictions, ordinances or statutes, and (c) free of all tenants and occupants.

4. Seller shall, at his expense, keep the buildings on the premises insured for the present amount until the time of the delivery of the deed, insuring them against loss by fire and other hazards, including the freezing of pipes and plumbing fixtures. In case of any loss: (a) Seller may use the insurance proceeds to restore the premises to substantially their former condition at any time prior to the time provided for the delivery of the deed or (b) if Seller shall not have so restored the premises, then Seller shall pay over or assign to Buyer all sums recovered or recoverable on account of said insurance upon payment of the purchase price, or if the premises have not been restored to substantially their former condition at the time provided for the delivery of the deed, Buyer may, at his option, terminate this Agreement and the binder shall be returned to him together with any interest thereon. The determination that the premises have been restored to substantially their former condition shall be made solely by Buyer.

5. Real estate taxes assessed on the premises as of December 31, 1985 , for the calendar year 1986 , shall be adjusted on the basis of a calendar year beginning January 1, 1986 , Seller paying prorata for the period from the beginning of such calendar year to the date of the delivery of the deed, and Buyer paying or assuming the balance of said taxes, provided, however, that if the amount of such taxes cannot be ascertained at the time of such delivery, it shall be conclusively presumed that the amount of the taxes to be adjusted equals the tax for the next prior tax year and the

adjustment shall be made upon the basis of such prior tax year's tax. All other taxes and assessments, including those improvements, which are a lien upon the premises shall be paid in full by Seller at the time of the delivery of the deed, except as provided in Paragraph 6 hereof.

6. Rents, fuel, water charges, fire district assessments, sewage use charges and assessments, etc., shall be adjusted as of the date of the delivery of the deed.

7. Personal checks without certification will not be accepted in payment of the purchase price, and, if for any reason Seller shall refuse the tender of a certified check or the check of a bank, Buyer shall be allowed a reasonable time in which to make a tender in cash.

8. If Seller shall be unable to give title or to make conveyance, or to deliver possession of the premises, all as herein stipulated, or if at the time of the delivery of the deed the premises do not conform with the provisions hereof (it being especially understood and agreed that Seller shall not be under any obligation to attempt to cure by litigation or otherwise any defect which may be found to exist in the title to the premises or to remove any encumbrance upon the title to the premises not voluntarily placed thereon by Seller or to correct any violations of subdivision, plat, building or minimum housing standard regulations or restrictions), then the binder shall be refunded and all other obligations of the parties hereto shall cease and this Agreement shall be void and without recourse to the parties hereto, unless Seller elects to use reasonable efforts to remove any

defects in title, or to deliver possession as provided herein, or to make the premises conform to the provisions hereof, as the case may be, in which event Seller shall give written notice of such election to Buyer at or before the time provided for the delivery of the deed, and thereupon the time for the delivery of the deed shall be extended for a period of thirty (30) days. If at the expiration of the extended time, Seller shall have failed to remove all defects in title or to deliver possession or to make the premises conform, as the case may be, all as herein agreed, then, at Buyer's option, the binder shall be forthwith refunded and all other obligations of all parties shall cease and this Agreement shall be void without recourse to the parties hereto. Buyer shall have the election, at either the orignal or any extended time for the delivery of the deed, to accept such title as Seller can deliver to the premises in their then condition and to pay therefor the purchase price without deductions, in which case Seller shall convey such title but without warranties against such defects.

9. Upon default by Buyer, Seller shall have the right to retain the binder, together with any interest thereon, as liquidated damages, unless Seller otherwise notifies Buyer in writing, within thirty (30) days after the time herein provided for the delivery of the deed, claiming either additional damages and/or specific performance.

10. This Agreement shall be binding upon and inure to the benefit of the respective heirs, executors, administrators, successors and assigns of the respective parties hereto and if two or more persons are named herein as Buyer, their

obligations hereunder shall be joint and several. The terms "Seller" and "Buyer" whenever used herein and any pronoun referring thereto shall be construed in the singular, plural, masculine, feminine or neuter in accordance with the manner in which this Agreement is executed whenever the context shall require.

11. To enable Seller to make conveyance as herein provided Seller may, at the time of the delivery of the deed, use the purchase money or any portion thereof to clear the title of any or all encumbrances or interests. The proceeds from the sale of the premises may be held by the Buyer or his attorney until such time as satisfactory discharges or releases are received by him for all liens on the title. At said time, the proceeds from the sale shall be tendered to Seller or his attorney.

12. The acceptance of the deed by Buyer or his nominee, as the case may be, shall be deemed to be a full performance and discharge of every agreement and obligation of Seller herein contained or expressed, except such as are by the terms hereof to be performed after the delivery of the deed.

13. Time shall be deemed to be of the essence.

14. Buyer acknowledges that Buyer has inspected the premises and all improvements thereon and in purchasing the same has not relied upon any warranties, representations or statements of the Seller or Broker as to its condition. Buyer agreeing to accept the premises "as is" and without expectation as to their suitability for any particular purpose whether or not expressed in this Agreement. ~~Unless the provisions of~~

LEARY AND HOLLAND

~~23-19.5-1 et seq. of the General Laws of Rhode Island, 1956,~~ as amended, entitled, "Percolation Tests and Water Table Elevation Determinations" have otherwise been complied with, the parties agree that all parties to the conveyance shall execute and file prior to the transfer of the premises a written waiver of the requirements of such Chapter, a copy of ~~which is attached hereto and made a part hereof as Exhibit "B"~~.

15. Any notice to any person which is required or may be given under the provisions of this Agreement shall be deemed to have been given when a written copy of such notice is delivered to such person to whom such notice is to be given or when mailed by United States certified or registered mail, postage prepaid, return receipt requested, addressed to such person at the address in this Agreement indicated, or, if no such address is indicated, then to his last and usual place of abode.

16. Pursuant to the provisions of 2-1-26 of the General Laws of Rhode Island, 1956, as amended, Seller hereby discloses to Buyer that all or part of the premises have previously been or could be determined to be a coastal wetland, bog, fresh water wetland, pond, marsh, river bank or swamp as those terms are defined in Chapter 1 of Title 2 of the aforesaid General Laws of Rhode Island. Buyer hereby releases the Seller and waives in its entirety the provisions of 2-1-26 and 27 of the General Laws of Rhode Island, 1956, as amended.

~~17. This Agreement is contingent upon the express~~ condition that the Buyer may, at his sole cost and expense, have an insect, ~~mechanical~~ (plumbing, heating and electrical) ~~and structural inspection(s) made upon the premises within~~

LEARY AND HOLLAND

BEST AVAILABLE COPY

~~fourteen (14) days of the date of this Agreement. In the~~ event that insect infestation or other damage may be found, the Buyer shall notify the Seller immediately and in any event not later than twenty-one (21) days after the signing of said Agreement, and may, at his option, terminate this Agreement and all deposits paid shall be promptly refunded to the Buyer, unless the Seller may elect, at the Seller's sole cost and expense, to rid the property of all infestation of insects and to repair any mechanical or structural damage before the time provided for the delivery of the deed. Failure to notify Seller in accordance with the above, and/or failure to have the inspection(s) made in a timely fashion as outlined above shall constitute a waiver of this contingency ~~by the Buyer~~.

~~18. Sale of the premises is contingent on there being~~ an adequate and potable supply of water thereon. Said determination shall be made solely by the Buyer. Buyer has fourteen (14) days from the date of this Agreement to conduct any and all testing. In the event that the supply is inadequate or not potable, the Buyer shall notify the Seller immediately and in no event not later than twenty-one (21) days after the signing of said Agreement, and may, at his option, terminate this Agreement and all deposits paid shall be promptly refunded to the Buyer, unless the Seller may elect at the Seller's sole cost and expense, to provide an adequate and potable supply of water before the time provided for the delivery of the deed. Failure to notify Seller in accordance with the above, and/or failure to have the testing(s) made in a timely fashion as outlined above shall ~~constitute a waiver of this contingency by the Buyer.~~

~~19. This Agreement is made under the express condition~~ that the Buyer shall be able to obtain a (conventional) (MGIC) (FHA) (Other - specify) first mortgage with an institutional first mortgage lender at conventional rates and terms in an amount not less than Dollars. If, after a reasonable and diligent effort has been made by the Buyer, he is unable to obtain such a mortgage commitment, this Agreement shall become null and void and all deposits paid shall be promptly refunded, provided the Buyer shall have notified the Seller within five (5) days of the date of his notification of his inability to obtain such a mortgage commitment, otherwise this provision shall become null and void and the Agreement shall remain in full force ~~and effect.~~

~~20. The parties hereto agree that~~ Dollars of the purchase price is to be paid by the Note of the Buyer, payable to the Seller, dated even date with the Deed of the Seller, to be paid in years bearing interest at percent per annum, payable monthly in equal monthly installments of Dollars, the first payment to be made and secured by a Power of Sale mortgage in the usual form upon the said premises subject to a prior mortgage to in the amount of Seller is under no obligation, however, to accept any Note ~~of Buyer's Nominee~~.

~~21. The Seller agrees that in order to induce the~~ title company selected by the Buyer to issue a Mortgagee's Policy on the subject premises without the standard exceptions, he will sign the Affidavit contained in Exhibit "C", which is attached hereto and made a part ~~hereof, prior to or at the closing.~~

22. The "Binder", as hereinbefore referred to shall be kept in the Broker's escrow or trustee's account earning current Money Market or an equivalent rate of interest. Upon closing, any and all interest earned on said account shall be paid over to Seller. In the event that Buyer cancels this Agreement in accordance with the terms hereof, said interest shall be paid over to Buyer.

~~23. Seller represents to Buyer that said premises~~ are to be conveyed together with a satisfactory means of access and egress by a motor vehicle and for the installation of electric power and telephone services from ~~to the premises to be conveyed~~.

24. Seller represents that he is not a foreign person as defined under Setion 1445 of the Internal Revenue Code and will sign an Affidavit to that effect in form satisfactory to Buyer's attorney at closing.

25. This Agreement is contingent upon Buyer receiving percolation and water table test results satisfactory to buyer. Said testing to be at Buyer's expense.

26. This Agreement is contingent upon Buyer obtaining State approval for the design of an individual septic system for the proposed future construction of a four bedroom single family residence on the premises. Said approval to be obtained at Buyer's expenses.

27. Subject to easements of record.

It is understood that a broker's commission of Ten (10) percent of the full purchase price of the premises is to be paid to Miriam Scott, Ltd. hereinafter called the "Broker" by Seller upon delivery of the deed and payment of the balance of the purchase price by Buyer to Seller. Buyer represents to Seller that he dealt solely and exclusively with the Broker in negotiating the purchase of the premises.

We, the parties hereto, severally declare that this instrument contains the entire agreement between the parties and that it is subject to no understandings, conditions, or representations other than those expressly stated, and that Rhode Island law shall apply to its construction.

IN WITNESS WHEREOF, this instrument has been executed in several counterparts, each of which shall be deemed to be original, as of the 13TH day of August, 1986.

EXECUTED IN PRESENCE OF:

WITNESS — WARD L. HAUCK

WITNESS — LOUISE G. HAUCK

WITNESS — W. FREDERICK WILLIAMS, III

WITNESS — LOUISE A. WILLIAMS

BROKER:

MIRIAM SCOTT

WARRANTY DEED

WARD L. MAUCK of New York, New York and LOUISE G. CRIMMINS of Somers, New York, for consideration paid grant to W. FREDERICK WILLIAMS, III and LOUISE A. WILLIAMS of 7 Greenfield Lane, Concord, Massachusetts 01742, as Tenants by the Entirety with WARRANTY COVENANTS:

That certain lot or parcel of land located on the westerly side of West Main Road in the Town of Little Compton, County of Newport, State of Rhode Island, bounded and described as follows:

BEGINNING at a concrete post in the westerly side of West Main Road at the southeasterly corner of the parcel herein described and at the northeasterly corner of land now or formerly of Fort Church Properties Co., Inc.;

THENCE westerly to a concrete post at the easterly end of a stone wall and continuing westerly along said stone wall, bounded southerly by said Fort Church Properties land, a distance of 204 feet, more or less, to a corner;

THENCE turning and running northwesterly, bounded southwesterly by said Fort Church Properties land a distance of 630 feet, more or less, to a corner and land now or formerly of John G. Ledes and Sally C. Ledes;

THENCE northeasterly, bounded northwesterly by said Ledes land a distance of 438 feet, more or less, to an angle;

THENCE turning an interior angle of 165°0' and running easterly, bounded northerly by said Ledes land, a distance of 139 feet to West Main Road;

THENCE turning an interior angle of 90° and running southerly on West Main Road a distance of 643 feet, more or less, to the point and place of beginning;

However otherwise bounded and described, meaning and intending to convey and hereby conveying by this deed all of the land acquired by these grantors by deed from C. George Taylor and Eleanor G. Taylor dated October 7, 1968 and recorded on October 17, 1968 in the Records of Land Evidence for said Town of Little Compton in Book 44 at page 70.

WITNESS our hands this day of , 1986.

Ward L. Mauck

Louise G. Crimmins
f/k/a Louise G. Mauck

STATE OF NEW YORK
COUNTY OF NEW YORK

In Queens on the 29th day of August, 1986 before me personally appeared Ward L. Mauck, to me known and known by me to be the person executing the foregoing instrument, and he acknowledged said instrument, by him executed, to be his free act and deed.

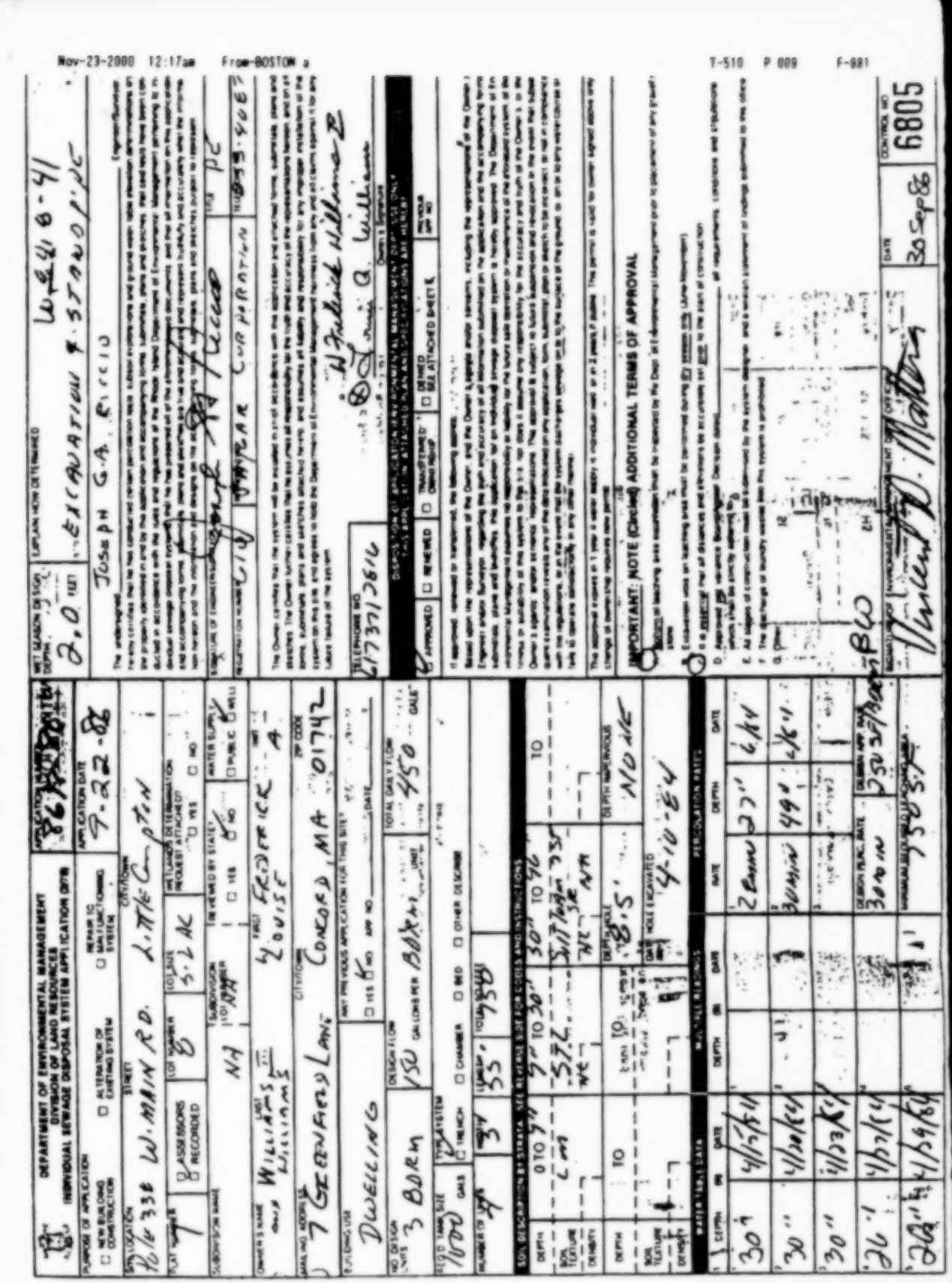
Notary Public
Printed Name:
My Commission Expires:

VINCENT T. HOBAN JR.
Notary Public, State of New York
No. 41-4740998
Qualified in Queens County
Certificate Filed in New York County
Commission Expires March 30, 1987

STATE OF RHODE ISLAND
COUNTY OF NEWPORT

In Little Compton on the 4th day of September, 1986 before me personally appeared Louise G. Crimmins, to me known and known by me to be the person executing the foregoing instrument, and she acknowledged said instrument, by her executed, to be her free act and deed.

Notary Public
Printed Name: Marianne Scott
My Commission Expires:
June 30, 1991



Nov-23-2000 12:17am From-BOSTON a T-510 P 009 F-881

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
DIVISION OF LAND RESOURCES
INDIVIDUAL SEWAGE DISPOSAL SYSTEM APPLICATION 6805

Joseph G.A. Riccio — Lot 41 6-41

Exchange St. Concord, Mass.

7 Greenfield Lane — Concord, MA 01742

Dwelling — 3 Bdrm — 450 gpd

Approved — Date 30 Sep 86

W. Frederick Williams

Louis A. Williams

Am. App. 18

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DEPARTMENT OF ENVIRONMENTAL MANAGEMENT
38 State Street
Providence, R. I. 02903

Date: 12/12/88

To: W. Frederick Williams, III
Louise A. Williams
7 Greenfield Lane
Concord, Mass.

Plat 7 Lot 8

Application No. 8810-84

Street Location: Pole 338
W. Main Rd.

CERTIFICATE OF CONFORMANCE

This Certificate of Conformance means that the Individual Sewage Disposal System which has been installed under the above application number appears to substantially conform with that indicated on the plan and specifications submitted. PERMISSION IS THEREFORE GRANTED FOR OCCUPANCY OF THE BUILDING AND FOR UTILIZATION OF THE SEWAGE DISPOSAL SYSTEM. By forwarding a copy of this certificate to the municipal building official, he is hereby authorized to issue a Certificate of Occupancy for the building provided all other local requirements have been met.

This Certificate is based solely upon the representations of the Owner and his agents who are responsible for the proper installation of this system. The Department of Environmental Management has approved the application in reliance upon those representations and is not responsible for any of the construction notes, details, specifications, distances or elevations indicated on the application, plan or specifications.

This approval is subject to future suspension and revocation in the event that subsequent examination reveals any of the data indicated on any application, plan or specifications to be incorrect, or not in compliance with applicable regulations or in the event that the system discharges sewage on or to the surface of the ground, or, on or to any watercourse or, fails to operate satisfactorily in any other manner.

Authority: _____

Individual Sewage Disposal Section
Division of Land Resources
Department of Environmental Management

Refer to Reverse Side
cc: Building Inspector

JAN 3 2001

No. 99-2047

JAN 8 2001

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of Certiorari to the Supreme Court of Rhode Island

BRIEF OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL LEAGUE OF CITIES, NATIONAL GOVERNORS' ASSOCIATION, U.S. CONFERENCE OF MAYORS, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD RUDA*
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the *Amici Curiae*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Amici will address the following question:

Whether the Supreme Court of Rhode Island properly dismissed petitioner's regulatory takings claim as unripe.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF ARGUMENT	2
ARGUMENT	5
I. THE SUPREME COURT OF RHODE ISLAND PROPERLY DISMISSED PETITIONER'S REGULATORY TAKINGS CLAIM AS NOT RIPE UNDER STATE LAW	5
A. Because A Fifth Amendment Takings Claim Is Not Ripe Until A Property Owner Has Utilized A State's Procedures For Obtaining Compensation And Been Denied Relief, A Regulatory Takings Claim Is Governed By State Law And State Ripeness Rules	6
II. PETITIONER'S CLAIM IS NOT RIPE UNDER FEDERAL RIPENESS PRINCIPLES	16
CONCLUSION	25

TABLE OF AUTHORITIES

Cases — Page

Agins v. Tiburon, 447 U.S. 255 (1980) 17
Asarco Inc. v. Kadish, 490 U.S. 605 (1989) 8
Borax Consolidated, Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) 24
City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 9, 10
Garvin v. Cochran, 371 U.S. 27 (1962) 8
Greater Providence Chamber of Comm. v. Rhode Island, 657 A.2d 1038 (R.I. 1995) 23, 25
Hall v. Nascimento, 594 A.2d 874 (R.I. 1991) 23
Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264 (1981) 8-9, 17
Hurley v. Kincaid, 285 U.S. 95 (1932) 9
Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 23
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 12
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) ..... *passim*
Michigan v. Long, 463 U.S. 1032 (1983) 11
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 17
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 12, 17
Reno v. Catholic Social Servs., Inc., 509 U.S. 43 (1993) 7
Shively v. Bowlby, 152 U.S. 1 (1894) 23
State v. Ibbison, 448 A.2d 728 (1982) 24
Suitum v. Tahoe Reg. Planning Agency, 520 U.S. 725 (1997) ..... *passim*
Texas v. United States, 523 U.S. 296 (1998) 16, 21, 22
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1995) 16

TABLE OF AUTHORITIES—Continued

Page

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 8
United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 22
Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank, 473 U.S.172 (1985) ..... *passim*

Statutes and Regulations

Coastal Resources Management Council, The State of Rhode Island Coastal Resources Management Program (as amended June 28, 1983) 20
§ 120 11
§ 120.A 16
§ 120.A(1) 12
§ 120.A(2) 12
§ 120.A(3) 12
§ 120.A(4) 12
§ 120.A(5) 12
§ 120.B 11
§ 130.A(1) 11
§ 300.1 14
§ 300.1.2 14
§ 300.1.8 14
§ 300.3.B.1 14
§ 300.3.B.2 14
§ 300.6.C 15
§ 300.10.C.1 14
§ 300.10.C.2 14
R.I. Gen. Laws § 42-35-15 10
Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §§ 1201 *et seq* 17
33 U.S.C. § 1344(a) 22

TABLE OF AUTHORITIES—Continued

Other Authorities	Page
Daniel R. Mandelker, *Land Use Law* (4th ed. 1997)	21
Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* (3d ed. 1999)	8
C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (1984)	16

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a substantial interest in legal issues that affect state and local governments.[1] Land use regulation is one of *amici*'s most important functions. *Amici* therefore have a manifest interest in this regulatory takings case.

The threshold question—whether petitioner's regulatory takings claim is ripe—is of particular importance to *amici* and their members. Petitioner asks for this Court to federalize the law of ripeness applicable to regulatory takings claims brought in the state courts. This would be an especially unwarranted result because this Court does not possess supervisory powers over the state courts. Moreover, as the text of the Fifth Amendment makes clear, a regulatory takings claim does not become a federal claim at all until a property owner has sought and been denied just compensation in the State's courts. Until a property owner exhausts the State's remedy for obtaining just compensation, the claim is governed by state law. Absent a showing—which has not been made here—that a State's ripeness rule violates the Due Process Clause, there is no basis for this Court to overturn the Supreme Court of Rhode Island's ripeness determination.

---

[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have issued is a blanket consent to the filing of briefs *amicus curiae*, which is on file with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. A state court adjudicating a regulatory takings claim is not bound by the prudential ripeness principles that govern Fifth Amendment takings claims in the federal courts. While state courts can look to these principles for guidance, state courts are free to establish state ripeness rules so long as those rules do not violate the due process clause of the Fourteenth Amendment.

This conclusion is compelled for two reasons. The first is that this Court does not possess supervisory powers over the jurisdiction of the state courts. The second is that where a State provides a remedy for obtaining compensation for a regulatory taking, the claim is governed by state law until the property owner has exhausted the State's remedies and been denied just compensation. Until the property owner exhausts the State's remedies, the property owner has no federal claim and the federal ripeness principles applicable to Fifth Amendment takings claims do not control. The Rhode Island Supreme Court could therefore validly hold, as a matter of state law, that petitioner was required to submit "additional applications" for less ambitious development.

While the Rhode Island Supreme Court did not cite authority for its ripeness determination, a rule of the State's Coastal Resources Management Council authorized the granting of a variance from the Council's standards. Petitioner, however, did not use the variance procedure. Furthermore, a state court has authority to fashion the State's ripeness rules to

protect the integrity of the administrative scheme applicable to petitioner's property. Petitioner did not comply with the Coastal Council's rules that required him to obtain various permits before applying for permission to develop the property. The Rhode Island Supreme Court could have validly insisted on compliance with the Council's rules as a condition precedent to judicial review. Petitioner's contention that his suit is ripe notwithstanding his failure to comply with the Council's rules is simply an attempt to short-circuit the review process and shift the burden of proof as to compliance from himself to the State.

2. When reviewed under federal ripeness principles, petitioner's claim is likewise not ripe. This Court's cases require a determination of the level of development permitted by regulatory authorities before addressing whether a taking has occurred. Thus, the Court has required that a property owner obtain a "final decision regarding the application of the regulations to the property at issue." *Williamson Cty. Reg. Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985). This final decision rule requires that a property owner exhaust available administrative remedies—including procedures for obtaining a variance—before bringing a takings claim. This rule "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 734 (1997) (citation omitted).

Of petitioner's two applications to fill the wetlands, only the beachclub application proposed any type of development. Although petitioner sought a special exception for both applications, he has never utilized the Council's variance procedure. Thus, while this

dispute centers on approximately eighteen acres of wetlands, the precise size of the property—which clearly includes several upland areas—is unknown. Notwithstanding petitioner's assertions to the contrary, the Council has never determined the scope of permissible development on these upland areas and a court cannot determine whether petitioner has been denied all economically viable use of his property.

Furthermore, petitioner's failure to obtain the permits which are prerequisites under the Council's rules compels this Court to speculate as to the suitability of the property for development. Because petitioner's claim rests on contingent future events that include regulatory approvals by federal, state and local agencies, no court can fairly determine the economic impact of the Council's action and the extent to which it interferes with petitioner's reasonable investment-backed expectations. A court thus cannot decide either whether a taking has occurred or the property's fair market value.

Finally, the Court should dismiss petitioner's claim as unripe because there is substantial uncertainty as to whether petitioner even owns the wetlands that the State allegedly has "taken" from him. Rhode Island follows the common law rule that the State has title to lands that are below the mean high water mark. The Rhode Island Supreme Court's decision (Pet. App. 3a) and the 1980 assessor's plat (Joint Lodging No.2, Defendant's Ex. AA) suggest that a substantial amount of the property is below the mean high-water mark and thus belongs to the State, not to petitioner. This Court cannot answer the question of whether petitioner has been denied economically

viable use of property without knowing how much property he owns.

ARGUMENT

I. THE SUPREME COURT OF RHODE ISLAND PROPERLY DISMISSED PETITIONER'S REGULATORY TAKINGS CLAIM AS NOT RIPE UNDER STATE LAW

The Supreme Court of Rhode Island correctly held that petitioner's regulatory takings claim was not ripe for review notwithstanding the CRMC's denial of his two applications. Petitioner takes issue with the Rhode Island Supreme Court's holding that his claim was not ripe because he was required to submit "additional applications" seeking "permission for less ambitious development plans." Pet. App. 11a & 12a n.6; *see also* Pet. Br. 14-20. While petitioner asserts that the Rhode Island Supreme Court "failed to understand that Mr. Palazzolo has satisfied all of this Court's ripeness requirements for regulatory takings claims," Pet. Br. 10-11, petitioner misapprehends ripeness doctrine and the Fifth Amendment's takings clause.

As explained below, this Court has limited authority to review the ripeness doctrine which a state court applies to cases before it. While the Rhode Island courts can seek guidance from this Court's general ripeness jurisprudence and the prudential rules applicable to takings claims brought in the federal courts, these rules are not binding on the State's courts. Because a Fifth Amendment takings claim against a state or local government does not become ripe until a property owner has exhausted the State's remedy for obtaining compensation, *see Williamson Cty. Reg. Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 194-97 (1985), a claim for compensation in the state courts is necessarily governed by state law. A state court can impose limitations on the availability of judicial review beyond those which apply in the federal courts so long as those requirements do not violate the Due Process Clause of the Fourteenth Amendment. No such showing can be made here. [2]

A. Because A Fifth Amendment Takings Claim Is Not Ripe Until A Property Owner Has Utilized State Procedures For Obtaining Compensation And Been Denied Relief, A Regulatory Takings Claim Is Governed By State Law And State Ripeness Rules

Petitioner asserts that " 'the demand for finality is satisfied' " with respect to his claim because there is " 'no question here about how the "regulations at issue [apply] to the particular land in question. " ' " Pet. Br. 14 (citations omitted). Petitioner therefore rejects the Rhode Island Supreme Court's " 'additional applications' requirement [as] inconsistent with" this Court's ripeness doctrine. *Id.* at 16. In petitioner's view, state courts can go no further than the limitations which this Court has created as a matter of federal ripeness doctrine. Petitioner thus asks this Court to take the unprecedented step of imposing a federal rule governing the justiciability of a regulatory takings claim heard in the state courts.

---

[2] For purposes of the arguments made at pp. 5-23 herein, *amici* assume that petitioner owns the wetlands which are the subject of this dispute. The legal uncertainty as to whether petitioner owns the wetlands is itself a further reason for dismissing this case as not ripe. *See* pp. 23-25, *infra*.

Petitioner's contention reflects a fundamental misunderstanding of this Court's takings jurisprudence and the role of this Court in supervising the state courts' determination of their jurisdiction. The argument is illogical, ignores a critical feature of Rhode Island law, and would unduly intrude on the State's sovereign authority to structure its administrative and judicial processes.

1. The first flaw in petitioner's argument is the erroneous premise that the Court's ripeness doctrine applicable in Fifth Amendment regulatory takings cases is binding on the state courts.

This Court has repeatedly explained that " 'ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction.' " *Suitum v. Tahoe Reg. Planning Agency,* 520 U.S. 725, 733 n.7 (1997) (quoting *Reno v. Catholic Social Servs., Inc.,* 509 U.S. 43, 57 n.18 (1993)). The Court has further stated that "[t]here are two independent prudential hurdles to a regulatory takings claim brought against a state entity *in federal court.*" *Suitum,* 520 U.S. at 733-34 (emphasis added). The first of these requirements is that a property owner must have "received a '*final decision* regarding the application of the [challenged] regulations to the property at issue' *from 'the government entity charged with implementing the regulations.'* " *Id.* at 734 (quoting *Williamson County,* 473 U.S. at 186) (emphasis added).

The takings claims at issue in both *Suitum* and *Williamson County* were brought in federal district court. *See Suitum,* 520 U.S at 731-33; *Williamson County,* 473 U.S. at 182. This Court, of course, "has broad supervisory power over the lower federal

courts." Ronald D. Rotunda & John E. Nowak, 1 *Treatise on Constitutional Law* § 213, at 191 (3d ed. 1999); *see also Asarco Inc. v. Kadish,* 490 U.S. 605, 621 n.1 (1989) ("'supervisory power over the judgments of the lower federal courts . . . is a broad one'") (quoting *United States v. Munsingwear, Inc.,* 340 U.S. 36, 40 (1950)). It does not, however, possess "supervisory powers over state courts." Rotunda & Nowak, § 213, at 191. *Cf. Asarco,* 490 U.S. at 620 ("to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law . . . would be contrary to established traditions and to our prior decisions recognizing that the State courts are not bound by Article III"); *Garvin v. Cochran*, 371 U.S. 27 (1962) (this Court does not dictate to state courts the mootness principles to be applied under state law). The prudential limitations on the exercise of federal court jurisdiction over federal takings claims thus do not restrict a state court's authority to impose limits on its own jurisdiction.[3]

The text of the Fifth Amendment further refutes petitioner's attempt to federalize the law of ripeness to prohibit the Rhode Island courts from imposing their own ripeness rules. As this Court has explained, "[t]he Fifth Amendment does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County*, 473 U.S. at 194. *See also Hodel v. Virginia Surface Mining &*

[3] *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986), does not support federalizing the law of ripeness in the state courts. While *MacDonald* came to the Court from the California state courts, the Court analyzed the case under federal ripeness principles solely to assess its own jurisdiction. *See* 477 U.S. at 348.

Reclamation Assn., Inc., 452 U.S. 264, 297 n.40 (1981). Furthermore, the Fifth Amendment does not "require that just compensation be paid in advance of, or contemporaneously with, the taking." *Williamson County*, 473 U.S. at 194. Rather, "all that is required is that a reasonable, certain and adequate provision for obtaining compensation exist at the time of the taking." *Id.* (internal quotations and citations omitted).

The Court has thus held that where "a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson County,* 473 U.S. at 195. *See also id.* at 194 n.13 ("because the Fifth Amendment proscribes takings *without just compensation,* no constitutional violation occurs until just compensation has been denied"); *City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 710 (1999) ("had an adequate postdeprivation remedy been available," property owner "would have suffered no constitutional injury from the taking alone"); *Hurley v. Kincaid,* 285 U.S. 95, 104 (1932) ("the illegality . . . is confined to the failure to compensate [the owner] for the taking").

The consequence of these holdings is that a regulatory takings claim is not a takings claim at all for federal law purposes until the property owner has exhausted the State's remedies. *See, e.g., Williamson County*, 473 U.S. at 196 (observing that "[u]nder Tennessee law, a property owner may bring an inverse condemnation action to obtain just compensation for an alleged taking" and that the state courts "allow recovery through inverse condemnation

where the 'taking' is effected by restrictive zoning laws or development regulations"); *Del Monte Dunes*, 526 U.S. at 710 (property owner's Section 1983 action "did not accrue until [owner] was denied just compensation"). Until that point, the claim is governed by state law. Petitioner's suggestion that federal law supplies a rule which preempts the Rhode Island Supreme Court from adopting its own ripeness rules is thus not only unprecedented, *see, e.g., Asarco*, 490 U.S. at 620 & n.1, but is also illogical.

Thus, although petitioner contends that the Rhode Island Supreme Court's additional applications requirement "cannot be squared with this Court's ripeness jurisprudence," Pet. Br. 14, there is no need for it to be. That the Rhode Island Supreme Court "did not cite any authority for" its additional applications requirement does not, as petitioner suggests, manifest that the court was flouting federal law. *Id.* Rather, it indicates that the Rhode Island court understood that this Court's ripeness jurisprudence is not binding on state courts and that it was creating a rule of state law. This conclusion is confirmed by the court's statement explaining that "[t]he doctrine of administrative finality dictates that an applicant may not challenge administrative action by filing identical repetitive applications, but must bring any challenge in Superior Court in accord with the [Rhode Island] Administrative Procedures Act." Pet. App. 12a n.6 (citing R.I. Gen. Laws § 42-35-15).[4]

---

[4] A state court's dismissal on the ground that a non-federal claim is not ripe is an independent and adequate state law ground for the court's judgment. *Amici* acknowledge that when

> a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, [the Court] will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). *Long*, however, does not apply here. While it suggests that this Court will review a state court decision absent a clear expression that the decision is based on an independent and adequate state ground, *see id.* at 1041, *Long* involved a decision on the merits. The *Long* reasoning does not apply when the question involves the justiciability of a case in the state courts. As explained above, federal law does not control whether petitioner's claim was ripe in the Rhode Island courts.

2. While the Rhode Island Supreme Court did not cite authority for its additional applications requirement, the Coastal Council's rules authorized the granting of a variance from the Council's standards. Coastal Resources Management Council, The State of Rhode Island Coastal Resources Management Program § 120, at 29 (as amended June 28, 1983). In contrast to the special exception provision emphasized by petitioner, which required a showing that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests," *id.* § 130.A(1), the variance provision authorized the Council to grant "[r]elief from a standard" based on a lesser showing. *Id.* § 120.B. The variance criteria specifically took into account whether "[d]ue to conditions at the site in question, the standard will cause the applicant an undue

hardship." *Id.* § 120.A(3). While an applicant was required also to meet other criteria,[5] the Council's granting of a variance would likely address the central concern of the Takings Clause—protection against a regulation that "'goes too far'" because it allows "'*no* productive or economically beneficial use of land.'" *Suitum*, 520 U.S. at 734 (quoting *Pennsylvania Coal. Co. v. Mahon*, 260 U.S. 393, 415 (1922), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1014-19 (1992)).

Petitioner did not utilize the Coastal Council's variance procedure. *See* Resp. App. 35a. Perhaps this is explained by petitioner's view that it "simply *does not matter*" that the agency would approve "a less intensive plan" where an owner deems such a plan to be insufficient to "satisfy his reasonable investment-backed profit expectations." Pet. Br. 19. Indeed, petitioner goes so far as to assert that "the *ripeness* of a takings claim should not turn on the accuracy of the property owner's allegations about economic viability or profit expectation." *Id.* Presumably this is because "it might turn out"—after a trial—that a "property owner's allegations regarding economic viability and profit expectations are simply wrong." *Id.*

But as this case demonstrates, under petitioner's approach the ripeness of takings claims will be based

---

[5] The other criteria are: whether "[t]he proposed alteration conforms with applicable goals and policies in Parts Two and Three" of the Council's regulations, whether "[t]he proposed alteration will . . . result in significant adverse environmental impacts or use conflicts[,]" whether "[t]he modification requested by the applicant is the minimum necessary to relieve an undue hardship[,]" and whether "[t]he undue hardship is . . . the result of any prior action of the applicant." Coastal Resources Management Program § 120.A(1), (2), (4), & (5).

on the highly subjective and wildly inflated profit expectations of a property owner. Here, for example, petitioner "sought damages in the amount of $ 3,150,000, based on the profits he claimed he would receive from . . . developing the property as seventy-four lots for single family homes." Pet. App. 5a. Petitioner brought this suit even though the town's "zoning law would not permit seventy-four lots to be developed on only eighteen acres," and that he would not "be able to obtain the necessary permits for the installation near [the pond] of the number of septic systems that his proposed development would require." *Id.* at 13a n.7.

Indeed, the Council did affirmatively establish these facts, although only after a lengthy and unnecessary trial with the concomitant expenditure of judicial resources. Furthermore, petitioner's approach would create an incentive to litigate rather than negotiate. Its likely consequence would be that property owners will submit grandiose plans, in effect daring the government to deny their application so as to precipitate a lawsuit. This is an especially inappropriate result given the complexity of land use regulation and the give-and-take of the administrative process. *Cf. MacDonald,* 477 U.S. at 350 ("The local agencies charged with administering regulations governing property development are singularly flexible institutions; what they take with the one hand they may give back with the other."). And under petitioner's rule, every agency denial of a permit application could give rise to a lawsuit.

It is entirely appropriate for the Rhode Island Supreme Court to fashion the State's ripeness rules to protect the integrity of the state administrative scheme applicable to petitioner's property. Indeed,

while the state supreme court recognized that petitioner had not shown at trial that he "would be able to obtain the necessary permits for the installation near Winnapaug Pond of the number of septic systems that his proposed development would require," Pet. App. 13a n.7, the court could have validly insisted on compliance with the Coastal Council's rules as a condition precedent to his inverse condemnation claim. Of note, a Coastal Council rule expressly declares as "[p]rerequisites" that "[a]pplicants for residential structures shall obtain, as necessary, a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued," and that "[a]pplicants proposing to build an individual sewage disposal system (ISDS) shall obtain a permit from the Department of Environmental Management." Coastal Resources Management Program, § 300.3.B.1 & .2.[6] *See also*

[6] The Council's rules state that "[a]ll persons applying for a Category B Assent . . . are required to . . . demonstrate that all applicable local zoning ordinances, building codes, flood hazard standards, and all safety codes, fire codes, and environmental requirements have [been] or will be met." Coastal Resources Management Program, § 300.1.(2). Applicants are also required to "demonstrate that there will be no significant deterioration in the quality of the water in the immediate vicinity. . . ." *Id.* § 300.1.8. The Council's prerequisites are "[a]dditional requirements . . . for specific Category B activities." *Id.* § 300.1.

Furthermore, both of petitioner's applications were subject to the following prerequisites: "[a] water quality certification from the Department of Environmental Management," and a Clean Water Act fill permit from the U.S. Army Corps of Engineers. Coastal Resources Management Program, § 300.10.C.1 & .2. Petitioner's failure to comply with the Council's permit requirements is especially significant in light of the trial court's

id. §300.6.C ("Applicants for Council Assents to construct . . . individual sewage disposal systems or point source discharges shall first obtain a permit from the Department of Environmental Management. . . . The Council shall formally review proposed actions only after all other applicable state/local requirements have been met."); Resp. App. 22a (Coastal Resources Management Council Management Procedure 4.2 [4] ("municipal and state approvals shall be construed as a prerequisite for any application before the Council considers the application")).

Petitioner failed to comply with these rules when he submitted his 1983 application. Indeed, "during the hearings on the 1983 application, he specifically stated that he had no plans to build on the filled land." Pet. App. 11a. Petitioner's contention that his suit is ripe notwithstanding his failure to comply with the Council's rules is simply an attempt to short-circuit the review process and shift the burden of proof as to compliance from himself to the State.[7] The Rhode Island Supreme Court was fully within its

finding that the filling of the wetlands "would constitute a public nuisance." Pet. App. 11b.

[7] In his reply to the State's brief in opposition, petitioner brushes aside the Coastal Council's rules. In response to the State's contention that he was required to obtain septic permit approval from the R.I. Department of Environmental Management before seeking a fill permit, petitioner replies: "Not only is this suggestion completely unsupported by any legal authority whatsoever, it is ludicrous on its face." Reply to Opposition to Petition for Writ of Certiorari at 6 n.3. Petitioner's assertion is flatly contradicted by the Council's rules. Moreover, the septic permit was just one of several prerequisites applicable to petitioner's applications. *See* Resp. App. 33a (testimony of CRMC Director Grover John Fugate).

authority to protect the Council from this blatant attempt to undermine the State's review processes. The court's dismissal on ground of lack of ripeness is therefore an independent and adequate state ground which supports the judgment below.

II. PETITIONER'S CLAIM IS NOT RIPE UNDER FEDERAL RIPENESS PRINCIPLES

When reviewed under federal ripeness principles, petitioner's takings claim is not ripe. Petitioner has not received a "final decision regarding the application of the regulations to the property" because he did not seek relief from the Coastal Council's standards under the variance provision set forth in the Coastal Resources Management Program § 120.A. *See Williamson County*, 473 U.S. at 186. Moreover, petitioner's failure to comply with the Council's rules compels this Court to engage in speculation regarding the property's suitability for development. Indeed, because petitioner's claim "rests upon '"contingent future events that may not occur as anticipated, or indeed may not occur at all,"'" a decision other than dismissal of the case as unripe would necessarily constitute an advisory opinion in violation of Article III. *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1995) (quoting 13A C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3532, at 112 (1984))).

1. The Court has repeatedly held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at

issue." *Williamson County*, 473 U.S. at 186. *See also Suitum*, 520 U.S. at 734; *MacDonald*, 477 U.S. at 351; *Hodel*, 452 U.S. at 297; *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 137-38 (1978). This rule "follows from the principle that only a regulation that 'goes too far,' results in a taking under the Fifth Amendment." *Suitum*, 520 U.S. at 734 (quoting *Pennsylvania Coal*, 260 U.S. at 415). As the Court recently reiterated, "A court cannot determine whether a regulation has gone too far unless it knows how far the regulation goes." *Id.* at 734 (internal quotations and citation omitted).

At least since *Hodel*, the Court has held that the final decision requirement mandates that a property owner exhaust available administrative remedies as a prerequisite to bringing a takings claim. Thus the *Hodel* Court, in rejecting a takings challenge to the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. §1201 *et seq.*, explained that:

> There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement. . . or a waiver from the surface mining restrictions. . . . If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be reached with regard to individual properties, thereby obviating any need to address the constitutional questions. The potential for such administrative solutions confirms the conclusion that the taking issue . . . simply is not ripe for judicial resolution.

452 U.S. at 297 (citations and footnotes omitted).

Similarly, in *Williamson County* the Court held that although the property owner had submitted a development plan that had been rejected by the county, its failure to seek variances rendered its takings claim premature. *See* 473 U.S. at 187-91. The Court specifically observed that "in the face of respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plat was equivalent to a final decision that no variances would be granted." *Id.* at 190.

The *Williamson* Court explained that this rule "is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Id.* The Court "consistently has indicated that among the factors of particular significance in the inquiry" as to whether a taking has occurred "are the economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations." *Id.* at 191. These factors "simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Id.*

Turning to the jury's verdict that the county had denied the owner "economically viable use of its property," *id.* at 182, the Court explained that it "indicates only that it found that respondent would be denied the economically feasible use of its property if it were forced to develop the subdivision in a manner that would meet each of the Commission's eight objections." *Id.* at 191. Because it was not clear whether the owner would have "been denied all

reasonable beneficial use of the property had any of the eight objections been met through the grant of a variance," the Court concluded that "until the Commission determines that no variances will be granted, it is impossible for the jury to find . . . whether respondent will be unable to derive economic benefit from the land." *Id.* at 191 (internal quotation omitted). Or, as the Court succinctly put it in *MacDonald,* "no answer [to the takings inquiry] is possible until a court knows what use, if any, may be made of the affected property." 477 U.S. at 350.

The posture of this case is similar to that of *Williamson County*. While petitioner has submitted two applications to the Council to fill the wetlands on his property, only his beach club application proposed any specific development. *See* Pet. App. 11a. And while petitioner sought a special exception for both applications, he has never utilized the Council's variance provision. *See* Resp. App. 35a. As the Rhode Island Supreme Court explained, "Palazzolo has not sought permission for any other use of the property that would involve filling substantially less wetlands or that would involve development only of the upland portion of the parcel." *Id.*

Indeed, while this dispute centers on "approximately eighteen acres of wetlands," the precise size of the property—which clearly includes several uplands areas—is unknown. Pet. App. 3a; *see also* Joint Lodging No. 2, Defendant's Exhibit AA (plat map). Notwithstanding petitioner's various assertions to the contrary, the scope of permissible development on these upland areas has never been conclusively determined by the Council. The Rhode Island Supreme Court's statement that "it would be possible to build *at least* one single-family home on

the existing upland area, with no need for additional fill," Pet. App. 11a (emphasis added), an apparent reference to the area "at the eastern end of Shore Gardens Road," *id.* at 5b, does not establish whether additional development could occur in the upland area located at the southern end of the property, some of which may constitute developed barrier beach which can be filled. *See* Joint Lodging No.2, Defendant's Exhibit AA; *see also* Coastal Resources Management Program at 24; Resp. App. 37a, 42a-44a. Petitioner makes much of his testimony that "'CRMC informed him that *any* proposal involving the filling of wetlands would be denied.'"[8] Pet. Br. 12 (quoting Pet. App. 5b (trial court decision)). Absent the Council's conclusive determination as to the scope of permissible development on these upland areas, a court cannot determine whether petitioner has been denied all economically viable use of the property. *See Williamson County*, 473 U.S. at 191.

In sum, the courts still do not know "what use, if any, may be made of the affected property." *McDonald*, 477 U.S. at 350. And having failed to use the Coastal Council's variance provision, petitioner is precluded from objecting to the Rhode Island Supreme Court's "additional applications" requirement.[9]

---

[8] The basis for this finding appears to have been petitioner's testimony regarding discussions he had with CRMC staff members. *See* Trial Transcript at 120. Such hearsay does not establish what the Council would have done in response to a specific variance request.

[9] The ripeness principles applicable in the federal courts to Fifth Amendment takings claims support the adoption of an "additional applications" rule. As *MacDonald* explains, "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable views." 477 U.S. at 353 n.9. Rejection of a single development proposal does not answer the question of "what use, if any, may be made of the affected property." *Id.* at 350.

2. Petitioner's takings claim is not ripe for another reason. Petitioner has never obtained the prerequisite permits required under the Coastal Council's rules for either his 74-lot subdivision proposal (which was never disclosed to the Council) or his beach club applications. *See supra* at 14-15. Having failed to obtain these permits, which are garden variety regulatory requirements that advance the State's health and safety concerns as to water quality, sewage disposal, flood hazard standards, and building code and zoning compliance,[10] his claim compels the Court to speculate whether the property is suitable for development at all.

This Court has held that "[a] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. at 300 (internal quotations and citations omitted). Petitioner sought damages for the alleged taking of his property "based on its development potential" as a 74-lot subdivision. Pet. Br. 8. But the Rhode Island Supreme Court specifically observed that "the town's current zoning law would not permit seventy-four lots to be developed on only eighteen acres" and that

---

[10] *Cf.* Daniel R. Mandelker, *Land Use Law* § 9.02, at 388 (4th ed. 1997) ("modern subdivision control statutes . . . prohibit subdivisions in floodplains and environmentally sensitive areas"); *id.* at 389 ("Many states also have public health programs that affect subdivision development. They authorize state health and environmental agencies to regulate on-site wells and on-site sewage disposal through septic tanks and similar facilities.").

"there was no evidence that Palazzolo would be able to obtain the necessary permits for the installation near Winnipaug Pond of the number of septic systems that his proposed development would require." Pet. App. 13a.

Petitioner's claim thus requires the courts to pile assumption upon assumption and engage in pure speculation as to the property's suitability for development. The first assumption a court must make is that petitioner could obtain a variance from other governmental authorities allowing a 74-lot development on slightly more than eighteen acres located in a flood hazard zone. *See id.* The second assumption is that the State would grant ISDS permits and the number thereof. *See id.* The third assumption is that the State would grant a water quality certification, an unlikely result in light of the trial court's express finding—which was not overturned on appeal—that petitioner's "proposal would constitute a public nuisance." Pet. App. 11b. The fourth assumption is that the Army Corps of Engineers would grant a Clean Water Act Section 404 fill permit. *See* 33 U.S.C. § 1344(a); *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

In short, petitioner's claim "rests upon" so many "contingent future events," *Texas v. United States*, 523 U.S. at 300 (internal quotations and citations omitted), that no court can fairly determine the scope of permissible development. This is, however, essential for determining not only "the economic impact of the [Coastal Council's] action" but also "the extent to which it interferes with reasonable investment-backed expectations." *Williamson County*, 473 U.S. at 191. A court thus cannot

determine whether a taking has occurred or the property's fair market value. *See* Resp. App. 46a (testimony of Thomas S. Andolfo). Moreover, until such time as petitioner complies with the administrative process and establishes a level of development that would not constitute a nuisance, ruling on the other questions presented would be an advisory opinion in violation of Article III.

3. A final reason why the Court should dismiss petitioner's claim as unripe is that there is substantial uncertainty as to whether petitioner owns the wetlands that the State allegedly has "taken." The Court cannot address the question of whether the State has denied petitioner economically viable use of his property if it does not know how much property he owns.

This Court has long recognized that "the ownership of and dominion and sovereignty over lands covered by tide waters, or navigable lakes, within the limits of the several States, belong to the respective States within which they are found. . . ." *Shively v. Bowlby*, 152 U.S. 1, 47 (1894). *See also Illinois Central R.R. Co. v. Illinois*, 146 U.S. 387 (1892) (state holds title to submerged lands under public trust). While "each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy," *Shively*, 152 U.S. at 26, "Rhode Island decisional law and [the Rhode Island Supreme Court] have never cast aside the public-trust doctrine." *Greater Providence Chamber of Comm. v. Rhode Island*, 657 A.2d 1038, 1042 (R.I. 1995); *Hall v. Nascimento*, 594 A.2d 874, 877 (R.I. 1991) ("It is well settled in Rhode Island that pursuant to the public trust doctrine the State maintains title in fee to all soil within its boundaries that lies below the

high-water mark, and it holds such land in trust for the use of the public.").

In describing the property, the Rhode Island Supreme Court noted that "[s]ome of the lots laid out in the subdivision plat include a substantial amount of land that is under the waters of Winnipaug Pond. Additional land that is not permanently under water is subject to daily tidal inundation, and 'ponding' in small pools occurs throughout the wetlands." Pet. App. 3a. Moreover, the 1980 assessor's plat indicates that the mean high-water mark is at an elevation of 1.72 feet.[11] *See* Joint Lodging No. 2, Defendant's Exhibit AA. The elevations recorded on the plat suggest that a substantial amount—if not most—of the property is below the mean high-water mark and thus belongs to the State rather than to petitioner.[12]

Because petitioner may not even own much of the land to which he claims title, his takings claim may be nothing more than a groundless claim for compensation cast in the guise of a disagreement over the Coastal Council's "prohibition against filling coastal wetlands." Pet. Br. 12. If petitioner does not own the wetlands because they are below the mean high-water mark, the State did not commit a taking

[11] Consistent with this Court's decision in *Borax Consolidated, Ltd. v. City of Los Angeles*, 296 U.S. 10, 27 (1935), the Rhode Island Supreme Court has held that the mean high-water mark sets the landward boundary of the State's tidelands. *State v. Ibbison*, 448 A.2d 728, 731-32 (1982).

[12] The State raised this issue both at trial, *see* Defendant's Pre-Trial Memorandum 14-16, No. 88-0297 (R.I. Super. Ct. 1997), and on appeal. *See* Brief of Appellees 33-34, No. 98-333A (R.I. 2000). Neither court decided the issue.

when it prohibited him from filling them.[13] And even if some of the wetlands at issue are above the mean high-water mark, the Court cannot answer the question of whether petitioner has been denied economically viable use of property because the record does not reflect how much property he owns. Thus, until further fact-finding by the Rhode Island courts determines what portion of the wetlands belongs to petitioner, petitioner's takings claim is not ripe for adjudication by this Court.

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

[13] While the Rhode Island Supreme Court has held that a littoral owner who fills "with the acquiescence or the express or implied approval of the state and improves upon the land in justifiable reliance on the approval" can establish title, the owner must not have "created any interference with the public-trust rights of fishery, commerce, and navigation." *Greater Providence Chamber*, 657 A.2d at 1044. "The state can, however, at any time, place restrictions on the filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission." *Id.* Moreover, a littoral owner cannot obtain title against the State through adverse possession. *Id.* at n.2.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
JAMES I. CROWLEY
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* Counsel of Record for the
Amici Curiae

January 3, 2001

JAN 3 2001

Supreme Court, U.S.
FILED
JAN 3 2001

No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,
Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES,
General Treasurer, and
COASTAL RESOURCES MANAGEMENT COUNCIL,
Respondents.

On Writ of Certiorari
to the Supreme Court of Rhode Island

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, RHODE ISLAND CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND CALIFORNIA STATE ASSOCIATION OF COUNTIES AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

JAMES E. RYAN
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, Virginia 22903
(804) 924-3572

TIMOTHY J. DOWLING *
COMMUNITY RIGHTS COUNSEL
1726 M Street, NW
Suite 703
Washington, DC 20036
(202) 296-6889

January 3, 2001

* *Counsel of Record*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. PETITIONER'S TAKINGS CLAIM IS UNRIPE	6
A. This Case Is Unripe Because the Record Fails to Reflect the Permissible Uses of the Property	6
B. Petitioner Failed to Submit Even One Meaningful Application Needed to Ripen His Takings Claim	9
II. THE *LUCAS* "TOTAL TAKING" RULE IS BOTH CLEAR AND NARROW, AND IT DOES NOT APPLY TO THIS CASE	13
A. *Lucas* Does Not Guarantee Developers a Reasonable Return on Their Investment Properties	13
B. In Order to Determine Whether a Regulation Effects a Taking, the Entire Parcel of Land Must Be Considered	17
C. Petitioner's Argument That a *Penn Central* Taking Has Occurred Is Not Among or Fairly Included Within the Questions Presented	20
III. THE STATE'S PRE-EXISTING WETLAND PROTECTION LAWS ARE BACKGROUND PRINCIPLES FATAL TO PETITIONER'S TAKINGS CLAIM	20
CONCLUSION	27

TABLE OF AUTHORITIES

Cases — Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) 10, 13
Andrus v. Allard, 444 U.S. 51 (1979) 17, 18
Board of Regents v. Roth, 408 U.S. 564 (1972)..... 5, 24
City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 11, 16
City of Virginia Beach v. Bell, 498 S.E.2d 414 (Va.), *cert. denied*, 525 U.S. 826 (1998)..... 24
Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal., 508 U.S. 602 (1993) 17, 18
Daniel v. County of Santa Barbara, No. CV 98-9453 MMM (AJWx) (C.D. Cal. 1999) 25
District Intown Properties Ltd. Partnership v. District of Columbia, 198 F.3d 874 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000)..... 13
Dolan v. City of Tigard, 512 U.S. 374 (1994) 1
Eldridge v. Trezevant, 160 U.S. 452 (1896) 25
Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991) 9
Hoeck v. City of Portland, 57 F.3d 781 (9th Cir. 1995) 24
Hoehne v. County of San Benito, 870 F.2d 529 (9th Cir. 1989)..... 9
Hunziker v. Iowa, 519 N.W.2d 367 (Iowa 1994)... 24
Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 17, 18
Kim v. City of New York, 681 N.E.2d 312 (N.Y. 1997) 23, 26
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... *passim*
MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986).....4, 7, 8, 9, 11

TABLE OF AUTHORITIES—Continued

Page

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).....5, 26, 27
Otis Co. v. Ludlow Mfg. Co., 201 U.S. 140 (1906)..... 25
Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) 24
Palazzolo v. CRMC, 657 A.2d 1050 (R.I. 1995) ... 12
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)..... 13-14, 15, 16, 17, 18, 20
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)..... 18, 19
Planned Parenthood v. Casey, 505 U.S. 833 (1992)..... 17
Potomac Sand and Gravel Co. v. Governor of Maryland, 293 A.2d 241 (Md. 1972)..... 22
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)..... 24, 26
Southview Assocs. Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992)..... 12
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997)..... 8, 12
Washington v. Glucksberg, 521 U.S. 702 (1997)... 19
Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 7, 12
Wooten v. South Carolina Coastal Council, 510 S.E.2d 716 (S.C. 1999) 24
Yee v. City of Escondido, 503 U.S. 519 (1992)..... 20

Miscellaneous

James E. Brookshire, *The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use*, 38 Wm. & Mary L. Rev. 1047 (1997)..... 8

TABLE OF AUTHORITIES—Continued

	Page
Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369 (1993)	13
John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000)	19
Douglas T. Kendall, Timothy J. Dowling, and Andrew Schwartz, *Takings Litigation Handbook* (2000)	27
Gale R. Peterson, *Trade Secret Protection in an Information Age* (1997)	24
Restatement (Second) of Torts § 821B(2)(b) & cmts. c & e (1979 & Supps.)	23
Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155 (1985)	8
S. Rep. No. 105-242 (1998)	12
Sup. Ct. R. 14.1(a)	20
William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995)	19

INTEREST OF AMICI CURIAE [1]

The American Planning Association (APA) is a nonprofit, educational research organization designed to advance state and local land-use planning. With more than 30,000 members, it is the oldest and largest organization in the United States devoted to fostering livable communities through comprehensive planning. Because its members serve government agencies and landowners, the APA seeks to preserve the proper role of government in protecting our communities as well as constitutional protections for private property. The Rhode Island Chapter of the APA is an APA affiliate established to advance comprehensive planning in the State of Rhode Island.

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1400 municipalities across the country, and IMLA serves as the legal voice for the nation's local governments. The California State Association of Counties (CSAC) is a non-profit corporation whose membership consists of all 58 California counties. IMLA and CSAC have a vital interest in legal issues that affect local officials.

Our nation's planners and local officials "have long engaged in the commendable task of land use planning," *Dolan v. City of Tigard*, 512 U.S. 374, 396 (1994), and thus bring an important perspective to regulatory takings issues. Planners and local officials have a strong interest in ensuring that this Court's ripeness jurisprudence continues to

---

[1] Counsel for the parties did not author this brief in whole or in part. No person or entity other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of amicus briefs, and they filed a letter reflecting consent with the clerk.

recognize that land-use agencies are flexible institutions and that land-use disputes should be resolved through these institutions where possible. Amici also have a direct stake in ensuring that the Court's narrow "total taking" rule remains appropriately tailored so that it does not undermine legitimate community protections. Planners and local officials similarly seek to preserve the bedrock principle that a pre-existing state law may shape property interests in ways that fundamentally affect takings analysis.

STATEMENT OF THE CASE

We adopt the statement of the case set forth in respondents' brief. Below we clarify four points obscured by petitioner's brief that have special significance to the issues addressed herein.

First, petitioner mischaracterizes the nature of his takings claim. He repeatedly asserts that the claim is based on the 1986 denial by the Coastal Resources Management Council (CRMC) of petitioner's application to build a private beach club. Pet. Br. 8 nn.3 & 4, 15 n.7. The beach-club proposal required destruction of 11.4 acres of wetlands to allow for a fifty-car parking lot, port-a-johns, and other facilities. *Id.*; J.A. 32-33. At the heart of petitioner's case *as litigated*, however, is his desire to destroy all 18 acres of the fragile coastal wetlands on the site to build a 74-unit residential subdivision. In answers to interrogatories, he asserted that he seeks about $9 million in compensation, a figure derived from the subdivision plan. J.A. 47-48. In his opening statement to the trial court, petitioner's counsel referred to the development at issue as "need[ing] fill to be able to construct homes." *Id.* at 58. Petitioner's valuation evidence is based exclusively on the subdivision plan (J.L. No. 1, Tab 7, at 14, 17, 24), and the record is silent as to the economic viability of the beach club. Following petitioner's lead, the state trial court and supreme court quite naturally found that petitioner's

takings claim is rooted in his proposal to destroy all 18 acres of wetlands to build a subdivision, and they resolved the case on this basis. *E.g.*, Pet. App. A-2, A-5, A-11, A-13, B-1, B-10 to B-11. In seeking review by this Court, petitioner cited these very rulings to emphasize that his claim is based on the state's denial of permission to destroy all 18 acres of wetlands. Reply to Opposition to Petition for Writ of Certiorari ("Reply to Opp.") at 5-6.

Second, petitioner repeatedly asserts that it is undisputed that CRMC would permit only one house to be built on the property. Remarkably, he quotes the state supreme court's observation that petitioner could "build *at least* one single-family home" (Br. 13, quoting Pet. App. A-11 (emphasis added)), but then somehow concludes that it is "perfectly clear" that he may build *only* "one single family home and nothing more." Br. 13. The record shows, however, that petitioner could have applied to develop other portions of the property. One upland portion of the property—the one that everyone agrees may be used for a single-family home—consists of Lots 127-28 near the end of Shore Gardens Road. TR 190-91, 610-11; Pet. App. at B-9. A second potentially developable portion of the property—nowhere mentioned in petitioner's brief or petition for certiorari—consists of Lots 68-71. TR 610-12. Petitioner could have applied for permission to build additional homes on these lots. *Id.* Moreover, because petitioner has never submitted an accurate survey of the property, the record is silent as to whether there are other buildable upland portions on the site. TR 190. The permissible uses of the land are not undisputed as petitioner contends, but unknown.

Third, petitioner obscures the relevant property acquisition date. In seeking a writ of certiorari, petitioner "readily concede[d] for purposes of review in this Court that he became the 'owner' of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property." Reply to Opp. at 2. His opening brief

on the merits, however, muddles the issue. At times he asserts that he acquired the property "in 1959 and 1960" (Br. 2) and has "attempted to develop it since 1961" (Br. 1). Elsewhere, he acknowledges that he acquired the property in 1978 when the preceding owner, Shore Gardens, Inc. (SGI), dissolved. Pet. Br. 21. Throughout this litigation, petitioner has tried to play it both ways, but the state courts did not permit him to do so. *See* Pet. App. B-12 (trial court: "The plaintiff cannot claim that he owned the property for one purpose and that SGI owned the property for another purpose."); *accord*, *id.* at A-14 to A-15 & n.8 (supreme court: same).

Fourth, the trial court found that petitioner's proposed destruction of 18 acres of wetlands would constitute a public nuisance. Pet. App. B-11. The septic systems needed for the subdivision would threaten contamination of the groundwater, the sole source of drinking water for the community. *Id.* at B-10 to B-11; J.A. 80-88. Even without the septic systems, the destruction of 12% of Winnapaug Pond's wetlands would significantly reduce commercial and recreational shellfish and finfish populations. *Id.* Based on these facts, the trial court found that the proposed subdivision would be a public nuisance because it "would not be suitable for the locality of the subject property." Pet. App. B-11.

SUMMARY OF ARGUMENT

This Court's ripeness cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Although petitioner contends that the extent of permitted development is undisputed—one single-family house—this assertion is false. Petitioner's claim is unripe because he failed to apply for permission to build on other portions of his property, a

failure that leaves the record hopelessly incomplete regarding the permissible uses of the property. Moreover, although petitioner's claim is rooted in a plan to build a 74-unit subdivision, he failed to submit even one meaningful application for residential use.

The categorical rule of takings liability set forth in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), applies only in the "extraordinary circumstance" where regulation deprives land of all economically viable use. *Id.* at 1017. If the land retains some productive value, the categorical rule is inapplicable. *Id.* at 1019 n.8. The Supreme Court of Rhode Island correctly concluded that no *Lucas* taking occurred because petitioner's land was worth at least about $200,000 due to the undisputed ability to build at least one house on the property.

The state's wetland protection laws, which were enacted prior to petitioner's 1978 acquisition of the property from SGI, are background principles of law that shape his property interest and preclude takings liability. Treating Rhode Island's wetland protection laws as background principles is especially appropriate because they are designed to prevent nuisances and nuisance-like activity. Excluding positive law from the background-principles inquiry would improperly elevate common law over statutory law and render the inquiry an outdated remnant of a bygone era. This Court has held that a state statute or regulation may define and limit property interests for purposes of constitutional analysis. *E.g. Board of Regents v. Roth*, 408 U.S. 564 (1972). Treating positive law as background principles promotes appropriate finality and repose by precluding takings challenges to laws decades after enactment by owners far down the chain of title. Nothing in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), alters this analysis because that case confirms the legitimacy of treating pre-existing laws as background principles.

ARGUMENT

I. PETITIONER'S TAKINGS CLAIM IS UNRIPE.

A. This Case Is Unripe Because the Record Fails to Reflect the Permissible Uses of the Property.

Petitioner's ripeness argument is premised on the assertion that the only permissible use of his property is the construction of one single-family home. He repeatedly states (Br. 10-20) that it is "undisputed" that CRMC would permit only one house on the property, on Lots 127-28.

This assertion is false. The permissible uses of the land remain uncertain precisely because petitioner has failed to pursue them. For example, a second potentially developable portion of the property—nowhere mentioned in petitioner's brief or petition for certiorari—consists of Lots 68-71. TR 610-12. Petitioner could have applied for permission to build on these lots, *id.*, but he has never done so. Moreover, because petitioner never submitted an accurate survey of the property, there may be other buildable upland portions that are not reflected in the record. TR 190. It is remarkable for petitioner to contend that the permissible use of the land is "undisputed" given that petitioner has failed to disclose to CRMC and the courts the amount of potentially developable upland property on the site. To this day, petitioner still describes the site as having an "indeterminate amount of uplands." Pet. Br. 3.

Petitioner *never* submitted a reasonable proposal limited to houses on Lots 68-71, 127-28, or elsewhere on the property. Instead, petitioner pursued two extravagant proposals. In 1983, he applied for the most environmentally harmful proposal imaginable: the destruction of all 18 acres of coastal wetlands. In 1985, he proposed to destroy more than half the wetlands to build a private beach club. Petitioner evidently recognizes that these proposals had virtually no chance of

approval under state law. Pet. Br. 12 (in denying the applications "CRMC was merely executing its statutory 'mandate' * * *.") Because petitioner never pursued a reasonable land-use proposal consistent with state law, the record is silent as to whether CRMC would have approved it.

Petitioner's failure to apply for less intense development presents a textbook case of an unripe takings claim. In *MacDonald*, this Court held that its ripeness precedents "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." 477 U.S. at 351. To ripen a regulatory takings claim, the landowner must obtain "a final decision regarding how it will be allowed to develop its property." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985). This requirement "is compelled by the very nature of the inquiry required by the Just Compensation Clause." *Id.*

MacDonald emphasizes that "[r]ejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." 477 U.S. at 353 n.9. Thus, multiple applications are sometimes necessary to obtain the requisite determination as to "the type and intensity of development legally permitted on the subject property." *Id.* at 348. In *MacDonald*, the Court deemed unripe a takings challenge to the rejection of a 159-unit subdivision proposal because the applicable laws allowed for the possibility of less intense development. *Id.* at 352 n.8. The *MacDonald* court also observed that a landowner would not have a ripe takings claim upon the denial of permission to build just "five Victorian mansions" if less intense use might be approved. *Id.* at 353 n.9.

These ripeness requirements derive in large measure from the Court's recognition that land-use commissions are "singularly flexible institutions," *MacDonald*, 477 U.S. at 350, with a "high degree of discretion * * * in softening the

strictures of the general regulations they administer." *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725, 738 (1997). Land-use boards reflect "a tradition of pragmatic day-to-day dialogue" and employ a variety of flexible tools to accommodate competing concerns. James E. Brookshire, *The Delicate Art of Balance—Ruminations on Change and Expectancy in Local Land Use*, 38 Wm. & Mary L. Rev. 1047, 1047-48, 1082-98 (1997). The land-use process resembles alternative dispute resolution by using the informality of local government to mediate between developers and neighboring property owners. Carol M. Rose, *New Models for Local Land Use Decisions*, 79 Nw. U. L. Rev. 1155, 1168-71 (1985). Land-use boards also promote the participation of the local citizenry in the resolution of land-use disputes in ways unavailable to the judicial system. *Id.*

Petitioner suggests (Br. 18-20) that a takings claimant may circumvent this Court's ripeness requirements through the simple expedient of submitting a single land-use proposal and then alleging that any other land use is unviable, thereby rendering any additional applications (in his view) "legally irrelevant." On this theory, a landowner could apply for the most intense use imaginable, and then demand a trial on a takings claim merely by alleging that the most intense use is the only economically viable use. In *MacDonald*, however, the landowner unsuccessfully attempted this gambit, alleging in its complaint that it "was deprived of all beneficial use of its property." 477 U.S. at 352 n.8. The allegation was unavailing because the Court deemed the takings claim unripe due to the landowner's failure to pursue other permissible land uses.

The only exception to the requirement to pursue less intense land use is where it would be futile to do so. *Id.* Futility in this context refers to the inability to obtain government approval for any use of the land. *Id.* The futility

exception is not triggered by a mere allegation that a permitted use might be economically unviable. In *MacDonald* itself, the claimant's conclusory allegations of futility were insufficient to overcome the suggestion of the applicable laws that "not all development had been foreclosed." *Id.* at 352 n.8. The vast majority of lower court rulings confirm that a landowner may not skirt applicable ripeness requirements as easily as petitioner suggests. [2]

B. Petitioner Failed to Submit Even One Meaningful Application Needed to Ripen His Takings Claim.

Petitioner's claim contravenes this Court's ripeness requirements at an even more basic level because petitioner failed to submit even one meaningful application needed to ripen his takings claim.

To evaluate this matter, the Court must first determine the nature of petitioner's claim. The trial court found that petitioner's claim is that CRMC's "denial of his application to fill approximately 18 acres of wetlands * * * constitutes an inverse condemnation taking." Pet. App. B-1. The state supreme court similarly viewed the claim as alleging "that the CRMC's denial of [the] application to fill eighteen acres of coastal wetlands constituted a taking." *Id.* at A-2. The high court repeatedly based its analysis on petitioner's residential subdivision plan. *Id.* at A-5, A-11, A-13 & n.7. In seeking review by this Court, petitioner cited these rulings to stress that his claim is based on CRMC's denial of permission to fill

---

[2] *E.g. Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) ("To come within the [futility] exception, a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)."); *Hoehne v. County of San Benito*, 870 F.2d 529, 533-35 (9th Cir. 1989) (futility showing must demonstrate that the agency has "drawn the line, clearly and emphatically, as to the sole use to which [the property] may ever be put.").

all 18 acres of wetlands. Reply to Opp. at 5-6. Indeed, in deeming the case unripe, the state supreme court emphasized that "although Palazzolo claimed that his property was taken when he was denied permission to develop a seventy-four-lot subdivision, he never applied for permission to develop such a subdivision." Pet. App. A-11.

Petitioner's only response to this key ruling by the high court occupies a mere footnote in his opening brief. Br. 15 n.7. There, he suggests that the takings claim actually challenges the denial of permission to fill only 11.4 acres of wetlands to build a beach club. *Id.*; *see also id.* at 6, 8 nn.3 & 4. Yet the record contains no evidence regarding the economic viability of a beach club or the value of the property with a beach club on it. Instead, petitioner's valuation evidence assumes that the land will be used for a subdivision. J.L. No. 1, Tab 7, at 14, 17, 24. Petitioner's obfuscation on this score is understandable because he never applied to build a 74-unit residential subdivision. In the face of the lower court findings and holdings, which were based on petitioner's own representations and litigation strategy, petitioner's current assertions regarding the nature of his claim appear to be a post-trial rationalization to rescue an unripe claim.

Ripeness jurisprudence does not allow a takings claimant to engage in this bait-and-switch strategy. For example, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court declined to reach the merits of an as-applied takings challenge to zoning ordinances because the claimants failed to apply for permission to build houses as allowed under the ordinances. *Id.* at 260. Because the takings claim focused on residential development, the claimants were required to determine the extent to which the challenged laws allowed for such development. *Id.* There is no suggestion in *Agins* that the takings challenge would have been ripe if they instead

applied for permission to build a beach club or other project unrelated to their claim.

MacDonald, too, emphasizes that a takings claimant must submit at least one "meaningful application" to ripen a takings claim. 477 U.S. at 353 n.8. Needless to say, a land-use application is not "meaningful" if it allows a landowner to sandbag state and local officials by submitting one proposal and then using denial as a springboard for a sweeping takings claim based on a much more intensive use. One key purpose of the Court's ripeness rules is to encourage resolution of land-use disputes at the state and local level. To achieve this goal, a "meaningful" application should give land-use officials fair notice of the real stakes involved.

A meaningful application also should yield an adequate administrative record upon which to resolve a subsequent takings claim. *MacDonald*, 477 U.S. at 348-51. Petitioner's failure to apply for residential development, however, has resulted in a glaringly deficient record. The Supreme Court of Rhode Island concluded that petitioner's asserted land value is entirely "speculative" because the proposed subdivision is inconsistent with applicable zoning laws. Pet. App. A-13. It is not at all clear that local authorities would permit 74 homes to be built on the land. *Id.* at A-13 n.7. In view of these and other critical deficiencies in the record, petitioner should not be allowed to pursue a takings claim based on a residential subdivision plan he never pursued.

One final point deserves emphasis. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court expressed concern about a landowner becoming unfairly entangled in local land-use procedures. *Id.* at 694-98, 722. This is not such a case. It is petitioner who has proceeded in blatant disregard of basic requirements designed to protect neighboring property owners and the public from harmful land use. Petitioner's applications lacked basic information (Pet. App. B-2), and were consistently "vague,"

"inadequate," and "very poor." J.A. 7, 61-66. He submitted applications virtually identical to previously denied applications for no good reason. Pet. App. A-5, A-12 n.6. He failed to prosecute his court challenges in a diligent and timely fashion. *See Palazzolo v. CRMC*, 657 A.2d 1050, 1052 (R.I. 1995) (noting the "justified frustration of the court and counsel for defendants" due to the "dereliction" of petitioner's previous counsel). Worst of all, he hid the ball from coastland protection officials regarding his true development intentions to build a 74-unit residential subdivision. The delay and expense incurred by all involved, as well as the gaping holes in the record, largely are due to petitioner's own actions. Because he refused to abide by the rules that apply to all landowners, his takings claim remains unripe.[3]

[3] In addressing the ripeness issue, the amicus brief of the National Association of Home Builders (pp. 21-22, 27) purports to rely on APA's amicus brief in *Suitum*. In September 1997, however, the APA publicly repudiated key portions of that brief because it did not accurately represent the APA's views. The APA hereby reaffirms its disavowal of the *Suitum* brief. The instant brief represents the APA's established positions on these issues.

The NAHB also asserts (Br. 2) that federal courts dismiss 83% of takings cases on procedural grounds, but in the overwhelming majority of the cases relied on by the NAHB, the claimant failed to seek compensation in state court first as required by *Williamson County*. *See* S. Rep. No. 105-242, at 42-43 (1998) (minority views) (analyzing distortions in NAHB's ripeness statistics). Space limitations preclude a comprehensive response to the NAHB's other mischaracterizations of the case law, but an example will suffice. In *Southview Assocs., Ltd. v. Bongartz*, 980 F.2d 84 (2d Cir. 1992), cited at NAHB Br. 21, the developer offered an environmentally destructive subdivision proposal on a take-it-or-leave-it basis and then sued, forsaking other options that would have allowed for a similar subdivision consistent with applicable laws. *Id.* at 39-92, 98-99. The Second Circuit reasonably held that the developer should apply for permissible land uses before suing for a taking. *Id.* at 98-99. Any fair reading of the case undercuts the NAHB's assertion that it shows a need for a radical revision of ripeness doctrine.

II. THE *LUCAS* "TOTAL TAKING" RULE IS BOTH CLEAR AND NARROW, AND IT DOES NOT APPLY TO THIS CASE.

A. *Lucas* Does Not Guarantee Developers a Reasonable Return on Their Investment Properties.

This Court in *Lucas* faced the "extraordinary circumstance," 505 U.S. at 1017, where a land-use regulation left petitioner's property "valueless." *Id.* at 1020. Relying on *Agins*, 447 U.S. at 260, the Court held that where a regulation allows "*no* productive or economically beneficial use of land," *Lucas*, 505 U.S. at 1017, compensation generally must be paid unless the regulation is justified by background principles of law. *Id.* at 1027-32. *Lucas* thus established a bright-line, categorical rule for what this Court termed a "total taking." *Id.* at 1030. This bright-line rule, as this Court itself, numerous other courts, and commentators have all recognized, covers a very narrow range of regulations. *See, e.g., id.* at 1018; *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874, 882 (D.C. Cir. 1999), *cert. denied*, 121 S. Ct. 34 (2000); Richard A. Epstein, Lucas v. South Carolina Coastal Council: *A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369, 1369-77 (1993) (*Lucas* rule does not apply unless regulation deprives land of all value).

Importantly, regulations that do not amount to a "total taking" and therefore do not trigger the narrow *Lucas* rule may nonetheless require compensation. To determine whether regulations that deprive landowners of some, but not all, economically beneficial uses of land require compensation, this Court applies the three-part test set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104,

124 (1978). Under this test, the Court considers the economic impact of the regulation, the extent to which the regulation interferes with distinct investment-backed expectations, and the character of the government action. *Id.* This third factor requires, as the Court described in *Lucas*, 505 U.S. at 1015, "case-specific inquiry into the public interest advanced in support of the restraint." Thus, to determine whether compensation is due outside of the "extraordinary circumstance" of a total taking, this Court has required that the public interest be weighed alongside the economic effects of a regulation in order to make a practical determination of whether compensation should be paid in a particular case.

The relationship between *Lucas* and *Penn Central* is important to stress because petitioner and supporting amici at times suggest that unless the *Lucas* categorical rule is expanded to cover more than "total takings," the government could willy-nilly deprive landowners of just less than 100% of the value of their property without paying compensation. This is simply wrong, and this Court said as much in *Lucas*, when it responded to Justice Stevens's suggestion in dissent that only landowners who suffer a complete deprivation of value are entitled to compensation. *See Lucas*, 505 U.S. at 1019 n.8. This Court explained that, while the landowner who suffers a 95% diminution in value could not take advantage of the narrow categorical rule of *Lucas*, that landowner still might be owed compensation pursuant to *Penn Central*. *Id.* Thus, when the American Farm Bureau Federation and Rhode Island Farm Bureau, in their amicus brief at 15-16, suggest with alarm all the ways in which a government could avoid a compensable taking by leaving owners with "tiny remnants of their land," they are simply ignoring the role that *Penn Central* plays in takings analysis.

A straightforward application of *Lucas* to the undisputed facts of this case demonstrates beyond peradventure that petitioner is not entitled to the "total taking" rule established

in *Lucas*. Instead, petitioner's case—assuming for argument's sake that it is ripe and that background principles of state law do not preclude a takings claim—must be analyzed pursuant to *Penn Central*. Uncontradicted evidence introduced during the trial indicated that petitioner may build at least one home on the property, and that therefore the property was worth at least about $200,000 as of 1986. *See* Pet. App. A-13, B-5; J.A. 103-04.[4] Accordingly, the regulation at issue in this case, unlike the one at issue in *Lucas*, obviously did not deprive petitioner of "*all* economically beneficial uses" of his land. *See Lucas*, 505 U.S. at 1019. Petitioner therefore has not suffered a "total taking" and cannot take advantage of the narrow categorical rule of *Lucas*.

Petitioner seeks to avoid this straightforward application of *Lucas* by arguing that compensation must be paid whenever regulations interfere with the ability of developers to realize a "reasonable return" on their investment properties. *See* Pet. Br. 37-40. This argument is plainly contrary to *Lucas*, as even a casual reading of that opinion indicates. Indeed, if petitioner's reading of *Lucas* were correct, surely this Court's response to Justice Stevens's point in *Lucas* would have been different—i.e., if *Lucas* applied whenever regulations failed to guarantee a reasonable return to developers, then the person whose property suffered a 95% diminution in value probably would be entitled to compensation, as the landowner

---

[4] Evidence also indicated that the portion of petitioner's land that could not be developed was worth approximately $157,500 as an open-space gift. *See* Pet. App. A-13. Amicus Curiae Institute for Justice (IJ) argues strenuously that this remaining value does not suffice to preclude a total taking under *Lucas*, because *Lucas* "requires compensation when the land has been deprived of all beneficial *use*.". IJ Br. at 25. Although Amicus IJ misreads *Lucas*, insofar as that case established a rule for a regulation that left Lucas's land "valueless," the more important point is that Amicus IJ misreads *this case*. Because petitioner could build at least one home on his property, he has not been deprived of all beneficial *use* of his property.

who suffered such a diminution likely would have been deprived of a "reasonable return" on his investment.[5] In addition, contrary to petitioner's half-hearted implication, Pet. Br. 40, this Court's decision in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), offers no support for his adventurous reading of *Lucas*. There is no hint whatsoever in that decision that regulations that fail to provide developers a "reasonable return" should be considered a "total taking" and automatically require compensation.

Perhaps most importantly, accepting petitioner's argument would effectively require *Penn Central* to be overruled. By suggesting that compensation should be paid whenever a regulation deprives a developer of a "reasonable return," petitioner is attempting to avoid the multifactor test mandated by *Penn Central* by converting one of the three factors considered in that test—economic impact—into a new categorical test. To be sure, this transformation would work to petitioner's advantage, insofar as it would preclude consideration of the public interest in support of the regulation, which could counterbalance the economic impact of the regulation. But this transformation would eviscerate *Penn Central* and, indeed, the entire body of regulatory takings jurisprudence upon which that decision and subsequent decisions rest. *See Lucas*, 505 U.S. at 1015. Petitioner has offered no good reason for such a drastic and radical departure from this Court's traditional approach to

[5] Petitioner's reading of *Lucas* also rests on the assumption that this Court sought to establish a rule beyond that necessary to decide the case in *Lucas*, for the simple reason that the regulation at issue in *Lucas* rendered Lucas's land valueless. In addition to the fact that the *Lucas* opinion belies this assumption, it seems quite implausible that an opinion authored by one of this Court's most serious champions of judicial restraint, Justice Scalia, would have sought to cover a universe of cases not before the Court in *Lucas*.

regulatory takings. *Cf. Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992) (explaining the limited circumstances under which this Court should depart from precedent).

B. In Order to Determine Whether a Regulation Effects a Taking, the Entire Parcel of Land Must Be Considered.

Petitioner offers another radical suggestion in an attempt to shoehorn his case into the categorical rule of *Lucas*. He argues that the Court should examine only that portion of his property that is affected by the regulation to determine whether his property has been taken. *See* Pet. Br. 46-47. In *Lucas*, this Court indicated that the so-called denominator problem remained unsettled. *See* 505 U.S. at 1016 n.7. This description of the law was somewhat questionable, given that the Court in *Penn Central* had stated in no uncertain terms that "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. Instead, "this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." *Id.* at 130-31. *Accord, Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979).

Whatever the state of the law at the time of *Lucas*, this Court has more recently confirmed the approach described in *Penn Central*. In a unanimous 1993 ruling, this Court stated that, in assessing whether a regulatory taking has occurred, "a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable." *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 644 (1993). Petitioner's argument, therefore, is directly

contrary to this Court's decisions in *Penn Central*, *Keystone*, *Andrus*, and *Concrete Pipe*, *supra*.

Were this Court's precedent ignored and petitioner's argument accepted, a host of conventional zoning laws and regulations would require compensation. Every setback requirement, for example, that requires homeowners to build their homes several feet from a road, renders unbuildable a portion of the owner's property. Under petitioner's approach, such requirements, which are ubiquitous throughout this country, would trigger compensation. *See Keystone*, 480 U.S. at 498. Similarly, regulations limiting the development of air rights, those limiting the development of wetlands, and those limiting the buildable area of a particular lot would also trigger automatic compensation. *Cf. Penn Central*, 438 U.S. at 130-31. Justice Holmes recognized, in the case giving birth to regulatory takings, that the Court should be cautious in its approach to determining when a regulation requires compensation. "Government hardly could go on," Justice Holmes explained, "if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). As a functional matter, petitioner's suggestion that the takings inquiry should examine only those portions of land affected by regulations would raise precisely the danger recognized by Justice Holmes.

Petitioner's proposed regime is flawed not only functionally but conceptually as well. It rests, at bottom, on the idea—echoed by several amici—that regulations should be treated identically to physical invasions. *See* Pet. Br. 46-47. This suggestion ignores the fact that the core, historical function of the Takings Clause was to protect against physical expropriations. *See, e.g., Lucas*, 505 U.S. at 1028 n.15 (acknowledging "that early constitutional theorists did not believe the Takings Clause embraced regulations of property

at all"); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995) (explaining that originally the Takings Clause was understood to mandate compensation only when the government physically took property); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) (same).

In *Mahon* and subsequent cases, this Court departed from the original understanding for practical reasons, recognizing that some regulations might be so onerous as to be the functional equivalent of a physical expropriation—hence Justice Holmes's famous aphorism that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Mahon*, 260 U.S. at 415. In attempting to discern when regulations become the practical equivalent of a physical appropriation, this Court has tethered its analysis to the language and original understanding of the Clause. Petitioner's argument, by contrast, would essentially create out of whole cloth a new right that bears no resemblance to the Takings Clause, and would effectively rewrite that provision to read: "nor shall private property *be diminished in value* for public use without just compensation." We respectfully suggest that the Court should be just as reluctant to accept this invitation to create a new right as it is to create new rights under the guise of substantive due process. *Cf. Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) ("We must * * * exercise the utmost care whenever we are asked to break new ground in this field, lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the Members of this Court.") (internal quotation and citation omitted).

C. Petitioner's Argument That a *Penn Central* Taking Has Occurred Is Not Among or Fairly Included Within the Questions Presented.

In the last three pages of his brief on the merits, petitioner makes an argument that did not appear in his petition for certiorari. He argues that under the multifactor test of *Penn Central*, he deserves compensation. Pet. Br. 47-50. On its merits, this argument is not persuasive, and the Supreme Court of Rhode Island properly rejected it. Pet. App. A-17.

This Court, however, should not reach the merits of this issue because it is outside of the scope of questions presented in the petition for certiorari. *See* Sup. Ct. R. 14.1(a); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992). In this respect, this case is quite similar to *Yee*. In *Yee*, this Court refused to reach the question of whether a *regulatory* taking had occurred when the petition for certiorari asked the Court to consider whether a *physical* taking had occurred. *See* 503 U.S. at 537. Here, petitioner has asked this Court to consider whether a "total taking" pursuant to *Lucas* has occurred. Whether or not a taking has also occurred pursuant to the multifactor test of *Penn Central* "is a question *related* to the one petitioner[]presented, and perhaps *complementary* to the one petitioner[] presented, but it is not 'fairly included therein.'" *Id.*

III. THE STATE'S PRE-EXISTING WETLAND PROTECTION LAWS ARE BACKGROUND PRINCIPLES FATAL TO PETITIONER'S TAKINGS CLAIM.

Lucas holds that no physical or regulatory taking occurs where the challenged government action is justified by background principles of state law that shape and define the claimant's property interest. 505 U.S. at 1027-32. Here, the Supreme Court of Rhode Island (Pet. App. A-15 to A-16) correctly concluded that the state's general ban against

destroying fragile coastal wetlands—enacted before petitioner acquired the property in 1978[6]—is a background principle that deprived petitioner of a property interest to destroy those wetlands.

The *Lucas* Court illustrated the background-principles inquiry by noting that the owner of a lakebed would not be entitled to compensation if denied permission to engage in a landfill operation that would flood others' land. 505 U.S. at 1029. So long as the filling could be enjoined in the courts under established nuisance law, the landowner's bundle of rights does not embrace the right to engage in the filling. *Id.* The *Lucas* Court's hypothetical does not turn on whether the filling is prohibited by common-law nuisance or a pre-existing nuisance statute. *Id.*

The case at hand is remarkably similar to the *Lucas* hypothetical, but rather than involving flood risks, petitioner's proposed fill posed severe risks to public drinking water supplies and commercial and recreational fish populations. The trial court found that petitioner's planned subdivision would constitute a public nuisance because the requisite septic systems would threaten contamination of the groundwater, the sole source of drinking water for the community. Pet. App. B-10 to B-11; J.A. 84-88. Moreover, petitioner's proposed destruction of 12% of Winnapaug Pond's wetlands would reduce commercial and recreational shellfish and finfish populations in Rhode Island. *Id.*

In view of these findings, logic demands that Rhode Island's wetland protection laws be viewed as background principles. Positive law designed to prevent nuisances or

---

[6] Petitioner "readily concedes for purposes of review in this Court that he became the 'owner' of the property in 1978, *after* the enactment of regulations in place limiting his ability to develop his property." Reply to Opp. at 2; *see also* Pet. App. A-13 to A-14 (state supreme court ruling); B-8 to B-9 (trial court ruling).

nuisance-like activity is simply an extension of common-law nuisance. The very enactment of protective statutes and regulations often truncates the development of the common law for two reasons. First, these statutory provisions put the public on notice that the covered land uses are prohibited, which reduces the number of land-use conflicts that otherwise would lead to common-law actions. Second, if a landowner engages in a prohibited use, enforcement authorities typically resort to the statutory program, not common-law nuisance, to enjoin the violation. The instant case confirms this pattern in the takings context: although the trial court found that the proposed wetland destruction is prohibited by state nuisance law (Pet. App. B-10 to B-11), the Supreme Court of Rhode Island found it unnecessary to address this determination because it properly viewed the wetlands statute as a background principle that precludes takings liability.

Indeed, some new statutes simply reassert state control over property previously subject to the same restrictions under common law. *E.g.*, *Potomac Sand and Gravel Co. v. Governor of Maryland*, 293 A.2d 241, 250 (Md. 1972) (finding no taking where a statute reasserted state control over areas previously subject to a common-law ban on dredging in marshlands, emphasizing that under the statute "riparian owners are now in the same position as they were at common law * * *"). If states had not enacted modern environmental protection regimes, their common-law doctrines would have continued to evolve to address many of the problems now addressed by regulation. As a result, excluding state positive law from the background-principles inquiry would render the inquiry an irrelevant remnant of a bygone era.

In Justice Kennedy's words, the takings inquiry should embrace "the whole of our legal tradition." *See Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring in the judgment); *see also id.* ("Coastal property may present such unique concerns

for a fragile land system that the State can go further in regulating its development and use than the common law of nuisance might otherwise permit."). Not surprisingly, the Restatement of Torts—cited in *Lucas*, 505 U.S. at 1030-31, as providing guidance on the background-principles inquiry—discusses many cases that rely on statutory restrictions to determine that various land uses constitute a nuisance. Restatement (Second) of Torts § 821B(2)(b) & cmts. c & e (1979 & Supps.).

Virtually every lower court that has addressed the issue since *Lucas* has treated state positive law as a background principle for purposes of takings analysis. For example, in *Kim v. City of New York*, 681 N.E.2d 312 (N.Y. 1997), New York's highest court emphasized that excluding positive law from the background-principles inquiry would render the inquiry outdated and unworkable:

> It would be an illogical and incomplete inquiry if the courts were to look exclusively to common-law principles to identify the preexisting rules of State property law, while ignoring statutory law in force when the owner acquired title.
>
> * * * *
>
> The corpus juris of this State comprises constitutional law, statutory law and common law. To the extent that each of these sources establishes binding rules of property law, each plays a role in defining the rights and restrictions contained in a property owner's title. Therefore, in identifying the background rules of State property law that inhere in an owner's title, a court should look to the law in force, whatever its source, when the owner acquired the property.

Id. at 315-16 (citations omitted). Other courts repeatedly have concluded that state statutes and regulations may be

background principles,[7] including statutes that protect wetlands and coastal property.[8]

To be sure, *Lucas* refers to the common law as an important source of background principles (505 U.S. at 1031), but *Lucas* suggests other sources as well. For example, *Lucas* relies on *Board of Regents v. Roth*, 408 U.S. 564 (1972), for the proposition that property interests are defined by state law. *Lucas*, 505 U.S. at 1030. The *Roth* court made clear that the rules that shape and define property interests include "statutory and administrative standards." *Roth*, 408 U.S. at 576-78 (state statutes governing public employment "created and defined" claimant's property interest in a way that defeats his constitutional claim). *Lucas*'s analysis of background principles also relies on *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), which holds that pre-existing state law on trade secrets—much of which is statutory[9]—defines property interests for purposes of takings analysis. *Id.* at 1012. In cases involving land, this

[7] *E.g., Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996) (due to a pre-existing ordinance, "the right to erect a billboard did not inure in [the claimant's] title"); *Hoeck v. City of Portland*, 57 F.3d 781, 789 (9th Cir. 1995) ("[u]nder the [city code provisions in effect] at the time Hoeck took title, he had no right to use his property to maintain an abandoned structure."); *Hunziker v. Iowa*, 519 N.W.2d 367, 371 (Iowa 1994) (archeological artifact protection law is a background principle that precludes takings liability).

[8] *E.g., Wooten v. South Carolina Coastal Council*, 510 S.E.2d 716, 717-18 (S.C. 1999) (state coastal zone statute is a background principle that precludes takings liability); *City of Virginia Beach v. Bell*, 498 S.E.2d 414, 417-19 (Va.) (same; dune protection ordinance), *cert. denied*, 525 U.S. 826 (1998).

[9] *See* Gale R. Peterson, *Trade Secret Protection in an Information Age* § 2.1, at p. 2-9 & n.10 (1997) (42 states and the District of Columbia have statutes governing civil trade secret protection).

Court long has recognized that state positive law may shape and limit property rights.[10]

Recognition of positive law as a source of background principles is necessary to bring repose and certainty to land-use controls and other community protections. Under petitioner's theory, an as-applied takings challenge could survive for decades, passing from owner to owner, even where each new owner takes title with notice of the restriction. Any new government effort to enforce a pre-existing limitation, no matter how entrenched in the law, could lead to new litigation. This unsettling approach could wreak constitutional havoc on state property law and land-use planning.

Consider, for instance, *Daniel v. County of Santa Barbara*, No. CV 98-9453 MMM (AJWx) (C.D. Cal. 1999) (appeal pending), which is attached as an Appendix to the Brief of the California Coastal Property Owners Association as *Amicus Curiae* in Support of Petitioner (CCPOA Br.). There, in 1974 a prior property owner accepted a coastal development permit for a four-lot subdivision and agreed as a condition of approval to dedicate a public access easement. In 1987, a subsequent property owner implemented the condition by recording an irrevocable offer to dedicate the walkway, thus eliminating the property interest from the bundle of rights that could be transferred to a subsequent owner. CCPOA Br. App. 1a-2a. Neither of the previous landowners challenged

[10] *E.g., Otis Co. v. Ludlow Mfg. Co.*, 201 U.S. 140, 152 (1906) (Holmes, J.) ("it would not be very extravagant to say that [the appropriation of streams under the Massachusetts mill act] enters as an incident into the nature of property in streams"); *Eldridge v. Trezevant*, 160 U.S. 452, 462-69 (1896) (rejecting a 14th Amendment challenge to construction of a levee due to public servitude reflected in the Louisiana Civil Code). *Eldridge* presents a stark anomaly: if background principles included only common law, how could Louisiana, a civil code state, ever properly undertake a background-principles inquiry?

the condition as a taking. The current landowners, who are now challenging the easement, purchased the property subject to these conditions in 1997. *Id.* Even though the current and previous landowners have enjoyed the benefits of the subdivision approval and residential permits for many years, the current landowners now seek to undo agreements and understandings long considered settled. Their effort to do so—nearly thirty years after the fact—seeks an unjust windfall, for as the trial court found "[t]he price plaintiffs paid for the land was presumably reduced to reflect the exaction of the irrevocable offer to dedicate and the risk that the County would accept it." *Id.* at 25a. The principles of finality, repose, and fundamental fairness strongly counsel against petitioner's position.

Finally, despite petitioner's heavy reliance on a footnote in a 1987 case, *Nollan v. California Coastal Comm'n*, 483 U.S. 825, nothing in *Nollan* alters the analysis. There, the Court determined that landowners could bring a takings challenge to a dedication requirement in a building permit notwithstanding a pre-existing policy of the coastal commission to require dedications from similarly situated landowners. *Id.* at 833 n.2.

The *Nollan* footnote is inapposite for two reasons. First, unlike the state statutes and regulations at issue here, the policy in question in *Nollan* was just that, a mere policy, *id.* at 834 n.2, which did not rise to the level of a background principle that limited the Nollans' property interests. Thus the state had no pre-existing property interest that justified the dedication. *See Kim*, 681 N.E.2d at 316 n.3. Second, the footnote does not concern background principles. It responds to Justice Brennan's argument in dissent, 483 U.S. at 858-60, that under *Monsanto* the claimants lacked an expectation to build without making the required dedication. Petitioner's reading of the footnote would virtually eviscerate the *Lucas* background-principles defense, but the footnote says nothing

about background principles, and there is nothing in *Lucas* to suggest any tension with *Nollan*. Indeed, *Nollan* expressly left open the question whether a "pre-existing public right of access" found in California's positive law (its Constitution) could be used to defend the challenged dedication. *Nollan*, 483 U.S. at 833. In this respect, *Nollan* does not undermine the background-principles defense, but confirms it. *See* Douglas T. Kendall, Timothy J. Dowling, and Andrew W. Schwartz, *Takings Litigation Handbook* 160 (2000).

CONCLUSION

The judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted.

JAMES E. RYAN
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
580 Massie Road
Charlottesville, Virginia 22903
(804) 924-3572

TIMOTHY J. DOWLING *
COMMUNITY RIGHTS COUNSEL
1726 M Street, NW
Suite 703
Washington, DC 20036
(202) 296-6889

January 3, 2001

* *Counsel of Record*

JAN 3 2001

No. 99-2047

SUPREME COURT, U.S.
FILED
JAN 3 2001
CLERK

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND ex rel. PAUL J. TAVARES, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

AMICUS BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LA PLATA, COLORADO IN SUPPORT OF THE RESPONDENTS STATE OF RHODE ISLAND, ET AL.

GOLDMAN, ROBBINS & ROGERS, LLP

MICHAEL A. GOLDMAN
Counsel of Record
JEFFERY P. ROBBINS
Post Office Box 2270
Durango, Colorado 81302
(970) 259-8747

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

ARGUMENT 4

I. The Single Basic Test for a Regulatory Taking Is Whether the Regulation Eliminates All Reasonable Use of the Property 4

A. The Court's Decisions Have Consistently Required a Showing That All Economic Use Has Been Eliminated 4

B. Neither *Lucas* Nor *Penn Central* Establish a Partial Takings Test 7

II. The Requirement that a Regulation Eliminate All Reasonable Use is Supported By Sound Constitutional and Legal Policy Considerations 16

A. The Original Understanding of the Takings Clause Supports Use of the Single Basic Takings Test 17

B. Federalism Values Support Use of the Single Basic Takings Test 18

C. The Tradition of Judicial Deference to the Democratic Branches Supports Use of the Single Basic Takings Test 21

D. "Givings" and "Reciprocity of Advantage" Support Use of a Single Basic Takings Test 25

E. The Practical Need for Bright Line Legal Tests Supports Use of The Single Basic Takings Test 26

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Agins v. Tiburon, 447 U.S. 255 (1980) ... 4, 6, 14, 15, 16, 25

Alden v. Maine, 527 U.S. 706 (1999).....20, 21

Andrus v. Allard, 444 U.S. 51 (1979) 22, 25

Annicelli v. Town of South Kingston, 463 A.2d 133 (R.I. 1983)..... 20

Animas Valley Sand and Gravel v. Board of County Commissioners of the County of La Plata, Colorado, 8 P.3d 522 (Colo. App. 2000)..... 1

City of Monterey v. Del Monte Dunes, 526 U.S. 687 (1999) 4, 5, 9, 10, 21

Dolan v. City of Tigard, 512 U.S. 374 (1994) 5, 10

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 22, 23, 24

Edelman v. Jordon, 415 U.S. 651 (1974) 20

Ferguson v. Skrupa, 372 U.S. 726 (1963) 24

First English Evangelical Lutheran Church v. City of Los Angeles, 482 U.S. 304 (1987).....14, 15, 20

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995) 7, 24

Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va., 135 F.3d 275 (4th Cir. 1998)..... 6

Gregory v. Ashcroft, 501 U.S. 452 (1991)..... 18

Hodel v. Irving, 481 U.S. 704 (1987)..... 11

TABLE OF AUTHORITIES – Continued

Page

Jafay v. Board of County Commissioners, 848 P.2d 892 (Colo. 1993) 6

Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987) 5, 25

Lochner v. New York, 198 U.S. 45 (1905)..... 24

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11, 12, 27

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed. Cir. 1994)..... 15

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)..... *passim*

Lynch v. United States, 292 U.S. 571 (1934)..... 20

Mulvaney v. Napolitano, 671 A.2d 312 (R.I. 1995)..... 20

National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe. Ry. Co., 470 U.S. 451 (1985) 27

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 19

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 11

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, et al., 260 U.S. 393 (1922) 4, 18, 22

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992) 24

Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), *cert denied*, 514 U.S. 1064 (1995) 6

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 11, 12, 16, 19

TABLE OF AUTHORITIES – Continued

Page

Texas v. White, 74 U.S. 700 (1869) 18

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976) 23

Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955) 24

Webb's Fabulous Pharmacies, Inc., v. Beckwith, 449 U.S. 155 (1980) 11

Webster v. Doe, 486 U.S. 592 (1988) 20

Zealy v. City of Waukesha, 548 N.W. 2d 528 (Wis. 1996) 7

STATUTES AND OTHER AUTHORITIES CITED

31 U.S.C. 1304 7

Colorado Constitution, Article II, Section 15 2

Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137-39 (1999) 21

J. Peter Byrne, *Regulatory Takings and Judicial Supremacy*, 51 Ala. L.Rev. 949, 954 (2000) 22

John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) 17, 18

Robert H. Jackson, *The Struggle for Judicial Supremacy* 319 (1941) 23

Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1196, 1250-51 (1967) 28, 29

TABLE OF AUTHORITIES – Continued

Page

Antonin Scalia, *The Rule of Law as a Law of Rule*, 56 U. Chi. L.Rev. 1175 (1989) 27

William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L.Rev. 782 (1995) 17

AMICUS BRIEF IN SUPPORT OF THE RESPONDENTS, STATE OF RHODE ISLAND, ET AL.

The Board of Commissioners of the County of La Plata County, Colorado (the "Board"), respectfully submits this brief *amicus curiae* in support of respondent State of Rhode Island, et al.[1]

STATEMENT OF INTEREST

The Board has an interest in this case because the Board is a party to a regulatory takings case now pending before the Colorado Supreme Court involving facts similar to this case and raising a legal issue essentially identical to one issue on which the Court has granted certiorari. *See Animas Valley Sand and Gravel v. Board of County Commissioners of the County of La Plata*, 8 P.3d 522 (Colo. App. 2000), certiorari granted by the Colorado Supreme Court August 21, 2000, No. SC 151.

The case before the Colorado court involves a takings challenge under the Colorado Constitution by the owner of a sand and gravel excavation business to La Plata County's river corridor protection regulation. The regulation does not affect the owner's right to continue its established sand and gravel operation on approximately 10 acres of property not included within the designated corridor. The regulation also authorizes various other

[1] This brief was not authored in whole or in part by counsel for a party, and no person, other than amicus curiae or its counsel, made a monetary contribution to the preparation or submission of this brief. *See* Rule 37. A letter from the parties consenting to filing of amicus briefs is on file with the Court.

land uses (not including sand and gravel excavation) on the remaining 33 acres of the property included within the corridor, as of right or subject to compliance with a special permitting process. The owner has not sought permission to pursue any other type of development on this portion of the property.

At trial the Colorado District Court rejected the owner's taking claim. On appeal, the Colorado Court of Appeals reversed on one issue but upheld the trial court's basic conclusion that the regulation did not effect a taking because it did not deprive the owner of all "reasonable use" of the property. The Court of Appeals rejected the contention that, even if the owner has "some reasonable or economically viable use," a taking occurs under the Colorado Constitution if the regulation "goes too far" and "substantially diminishes the value of the property." *Id.* at 525-527.

The Colorado Supreme Court granted certiorari to consider, among other issues, the following question: "Whether a compensable regulatory taking can occur under Colo. Const. Art. II, Section 15, when the complained of regulation 'goes too far' and substantially diminishes the value of the property, even in circumstances where the property retains some economically viable use?"[2] This issue is obviously closely related to the question in this case concerning the magnitude of the economic burden necessary to establish a taking and, more specifically, the argument by petitioner and several

[2] Article II, Section 15 of the Colorado Constitution provides, in part, that: "Private Property shall not be taken or damaged for public or private use, without just compensation."

of his amici that he should be able to recover under a separate "partial" taking test even if the regulation allows reasonable economic use of the property. Because the Colorado Supreme Court follows closely this Court's interpretation of the federal Takings Clause in interpreting the parallel provision of the Colorado Constitution, and because in any event the Board's actions are directly subject to the federal Takings Clause, the Board has a significant interest in the outcome of this case.

As it did in the Colorado Supreme Court, amicus submits here that a compensable regulatory taking can occur only if a regulation denies all reasonable use of the owner's property. The petitioners in both the Colorado case and in this case argue that, even when a regulation does not eliminate all reasonable use, an owner can invoke a separate and independent "partial" takings test. This ostensible test, according to petitioners, would essentially involve a legislative-type analysis and balancing of the costs and benefits of the regulation. Amicus submits that no such independent "partial" takings test actually exists and that strong constitutional and legal policy considerations argue against the creation of such a test.

ARGUMENT

I. The Single Basic Test for a Regulatory Taking Is Whether the Regulation Eliminates All Reasonable Use of the Property.

A. The Court's Decisions Have Consistently Required a Showing That All Economic Use Has Been Eliminated.

The Court has repeatedly stated that a successful regulatory taking claimant must demonstrate that the regulation essentially destroys the property's economic value. Beginning with *Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393 (1922), the Supreme Court has defined regulatory takings doctrine narrowly, equating a regulatory taking with a complete appropriation of the property. The basic issue in a regulatory taking case, the Court said, is whether the regulation "has very nearly the same effect for constitutional purposes as appropriating or destroying it." 260 U.S. at 414.

In *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court said that, at least when a taking challenge focuses on the economic burden imposed by a restriction,[3] the

[3] The *Agins* Court also said, in the alternative, that a regulation may effect a taking if it "does not substantially advance legitimate state interests." 447 U.S. at 260. Today, it is debatable whether this type of means-ends claim can properly be grounded in the Taking Clause as opposed to the Due Process Clause. *See City of Monterey v. Del Monte Dunes*, 526 U.S. 687, 732 n. 2 (1999) (Scalia, J., concurring in part and concurring in the judgment); *see also id.* at 753 n. 12 (Souter, J., concurring in part and dissenting in part). There is no suggestion in this case, or in the case before the Colorado Supreme Court, that the government is not properly acting to advance a legitimate public interest.

single basic issue is whether the regulation "denies an owner economically viable use" of the property. 447 U.S. at 260. Likewise, in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), the Court rejected a taking claim, stating that the test for a taking based on economic impact is whether the regulation "denies an owner economically viable use of his land." 480 U.S. at 485 (quoting *Agins*, 447 U.S. at 260).

More recently, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), the Court affirmed a finding of a taking based on jury instructions that read in part as follows:

> For the purpose of a taking claim, you will find that the plaintiff has been denied all economically viable use of its property, if, as the result of the city's regulatory decision there remains no permissible or beneficial use for that property. In proving whether the plaintiff has been denied all economically viable use of its property, *it is not enough that the plaintiff show that after the challenged action by the city the property diminished in value or that it would suffer a serious economic loss as the result of the city's actions.*

526 U.S. at 700 (emphasis added). While the parties did not specifically dispute the propriety of this instruction, the Court stated that "the trial court's instructions are consistent with our previous general discussions of regulatory takings liability." *Id.* at 704.

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court addressed the issue whether the city effected a taking by attaching to a land use permit a condition requiring the owner to grant the public access to her

property. In the course of the opinion, the Court observed that if the city had simply prohibited further development on the greenway, no taking would have resulted, given that the owner could continue to operate her plumbing supply store on the other portion of the property. The basic test for a taking based on economic impact, the Court reiterated, is whether the regulation "den[ies] an owner economically viable use of his land." *Id.* at 384 (citing *Agins*, 447 U.S. at 260). Applying that standard, the Court said: "There can be no argument that the permit conditions would deprive petitioner of 'economically beneficial us[e]' of her property as she currently operates a retail store on the lot. Petitioner assuredly is able to derive *some* economic use from her property." 512 U.S. at 385 n. 6 (emphasis added).

In line with these precedents, the overwhelming majority of lower federal and state courts analyze regulatory takings claims by considering whether the regulation eliminates essentially all of the property's economic use or value. *See, e.g., Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting takings challenge when regulation caused "only" a 50 percent diminution in value, because "a regulatory deprivation that causes land to have 'less value' does not necessarily make it valueless"); *Reahard v. Lee County*, 968 F.2d 1131, 1135 (11th Cir. 1992) (overturning a finding of a taking where rezoning permitted construction of only one residence on 40 acres, observing that "the only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of the property"), *cert. denied*, 514 U.S. 1064 (1995); *Jafay v. Board of County Commissioners*, 848 P.2d 892, 901 (Colo. 1993) ("[T]he central issue to a takings inquiry is whether the governmental regulation as applied to the aggrieved landowner's property forecloses all use of the property."); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531 (Wis. 1996) ("[T]he rule emerging from opinions of our state courts and the United States Supreme Court is that a regulation must deny the landowner all or substantially all practical uses of a property in order to be considered a taking for which compensation is required.").[4]

B. Neither *Lucas* Nor *Penn Central* Establish a Partial Takings Test.

The so-called "partial taking" theory rests on a strained and unpersuasive interpretation of two U.S. Supreme Court decisions, *Lucas v. South Carolina Coastal*

---

[4] The principal dissenter from this general view has been the U.S. Court of Appeals for the Federal Circuit, which has adopted an expansive "partial" regulatory taking rule. *See Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560 (Fed. Cir. 1994), *cert. denied*, 513 U.S. 1109 (1995); *but see Id.* at 1573 (Nies, C.J., dissenting). Setting aside the legal merits of the Federal Circuit's approach, it is noteworthy that the Federal Circuit only hears takings claims against the United States. Takings claims against the federal government are generally paid out of the Judgment Fund, a permanent and unlimited appropriation designed to cover financial obligations incurred by the United States. *See* 31 U.S.C. 1304. States, much less counties and other local governments, obviously lack the same unlimited financial resources. The Board respectfully submits that the Takings Clause should be interpreted in a fashion that takes into account the practical challenges facing all levels of government throughout this country.

Council, 505 U.S. 1003 (1992), and *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978). According to this theory, *Lucas* established a two-tier regulatory takings test, with the first type of taking involving a "total" elimination of property value, and the second type involving a "partial" reduction in property value. In addition, according to this theory, the *Penn Central* decision supplies the standards for evaluating a "partial" taking claim; these ostensible standards include the economic impact of the regulation, the owner's investment-backed expectations, and the "character" of the government regulation. These three factors are supposed to be weighed in an ad hoc balancing test.

First and foremost, *Lucas* did not in fact establish a two-tier regulatory takings test. *Lucas* involved a prohibition on coastal development that, according to the undisputed findings of the trial court, made the property "valueless." 505 U.S. at 1009. The Court, by a margin of 6 to 3, with Justice Kennedy concurring, concluded that the South Carolina Supreme Court erred in rejecting the takings claim. In dissent, Justice Stevens, criticized the majority's ruling as "wholly arbitrary" on the ground that "[a] landowner whose property is diminished in value 95% recovers nothing, while an owner whose property is diminished 100% recovers the land's full value." *Lucas*, 505 U.S. at 1064. In response, Justice Scalia, speaking for the majority, responded by stating:

> This analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation. Such an owner might not be able to claim the benefit of our categorical formulation [in *Lucas*],

> but, as we have acknowledged time and again, "[t]he economic impact of the regulation on the claimant and . . . the extent to which the regulation has interfered with distinct investment-backed expectations" are keenly relevant to takings analysis generally.

Id. at 1019 n. 8 (quoting *Penn Central*, 438 U.S. at 124). This language does not establish that, if a claimant cannot demonstrate a taking under the traditional denial-of-all-economically-viable-use standard, the claimant is entitled to a separate bite at the apple based on a separate "partial" taking test derived from *Penn Central*.

First, Justice Scalia's reference to a possible separate *Penn Central* test was *dictum*. *Lucas* involved a regulation that rendered property "valueless" and the Court's closely divided ruling ultimately rested on that fact. The discussion of the standard (if any) that might apply in a case in which the property retains some economic value was unnecessary to the resolution of the case. Moreover, in the same footnote, Justice Scalia indicated that cases of 95% uncompensated loss will remain and that "takings law is full of these 'all or nothing' situations." *Lucas*, 505 U.S. at 1019 n. 8.

Second, as discussed above, numerous other decisions of the Court pre-dating and post-dating *Lucas* articulate a single basic test for a taking based on a regulation's adverse economic impact on the owner. These decisions contradict the novel idea of a two-tier takings analysis suggested by the *dictum* in *Lucas*. As discussed, just two years ago in *City of Monterey* the Court recited with approbation instructions directing a jury to find a "deni[al of] all economically viable use" if

"there remains no permissible or beneficial use for [the] property." *City of Monterey*, 526 U.S. at 700. The Court did not state, suggest or hint that recovery might have been possible on an alternative, less demanding "partial" taking theory. Similarly, as also discussed above, *Dolan* dispels the notion of a two-tier taking analysis. *See* 512 U.S. at 385 n. 6.

Third, the "partial" taking theory misapplies *Penn Central* by ignoring the substantial developments in takings doctrine during the 20-plus years since that decision was handed down. The *Penn Central* Court famously observed that defining a regulatory taking "has proved to be a problem of considerable difficulty," and, therefore, the Court had been forced to rely on "essentially ad hoc, factual inquiries" to resolve specific cases. 438 U.S. at 124. Nonetheless, the Court continued, its decisions had identified "several factors that have particular significance" for resolving regulatory takings claims:

> The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

Id. Contrary to petitioner's view, the *Penn Central* Court did not articulate a "partial" regulatory taking test and the decision does not support such a theory.

As a threshold matter, the *Penn Central* Court probably never intended the "ad hoc" factors described in the decision to serve as a free-standing, determinative test for a taking. The three factors mentioned in the decision are obviously relevant in takings analysis, but the Court

provided no indication about how these different factors might be weighted or combined to resolve a particular case. On its face, the Court's analysis could support the conclusion that virtually every newly enacted use restriction effects a taking; it can also be read to mean that such enactments rarely result in takings.

Perhaps because of the fundamental indeterminacy of the three "significant" factors identified in *Penn Central*, the Court has *never* relied on the ostensible *Penn Central* "test" to uphold a regulatory taking claim. The Court has referred to the *Penn Central* analysis frequently enough, but it has treated the analysis as inadequate, by itself, to support an actual finding of a taking. Instead, every Court decision upholding a taking claim over the last several decades has pointed to some special factor, such as the fact that the regulation completely destroyed the value of the property, *see, e.g., Lucas* (total elimination of value of coastal lots) *and Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (total destruction of economic value of trade secret); the regulation resulted in a physical occupation of private property, *see, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (forced occupation of private property by cable television equipment), *Dolan* (exaction resulting in a physical occupation), *and Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (same); *cf. Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) (analogizing appropriation of a specific fund of money to a physical occupation); or the regulation abrogated a particularly fundamental type of property interest, *e.g.*, the right to pass on property by inheritance, *see e.g., Hodel v. Irving*, 481 U.S. 704 (1987).

Whatever the Court's original intent in articulating the *Penn Central* 3-factor analysis, the Court, building

upon the foundation provided by that opinion, has subsequently articulated a series of definitive, bright-line rules addressing each of the key factors enumerated in *Penn Central*. First, the *Penn Central* Court referred to the "character" of the regulation as one factor in taking analysis. By this term the Court meant:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

438 U.S. at 124. In the subsequent *Loretto* decision, the Court determined that a government-authorized physical invasion of private property automatically results in a taking. *Loretto*, 458 U.S. at 426. Because the physical-invasion "character" of a regulation, by itself, automatically leads to a finding of a taking, the "character" factor has no logical place in any putative multi-factor test.

Second, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), another post-*Penn Central* case, the Court converted the "distinct investment-backed expectations" factor into another bright line rule. The Court ruled that, even when the value of a property interest is entirely eliminated, a taking claim is precluded if the claim is barred by a lack of investment-backed expectations. *Id.* at 1005. Again, because a lack of investment-backed expectations, by itself, precludes a finding of taking, that factor has no coherent role to play in a putative multi-factor test.

Finally, *Lucas* illustrates the circumstance when "economic impact," the third factor mentioned in *Penn Central*, can actually result in a finding of a taking. As discussed above, both before and after *Lucas*, the Court repeatedly stated that a taking can be established when a regulation eliminates essentially all economic use. In *Lucas*, where the property was actually made "valueless," the Court was confronted with a case involving the kind of severe economic loss that met the Court's longstanding economic-impact test. Thus, the holding in *Lucas* simply reaffirms the Court's position that a regulation effects a taking when it "denies an owner economically viable use" of the property. *Agins*, 447 U.S. at 260.

The Court's basic rules for evaluating a regulatory taking claim are now relatively clear. A physical occupation generally results in a taking, no matter how modest the economic impact on the owner. A lack of investment-backed expectations (outside the physical-occupation context) generally precludes a regulatory taking claim, no matter how stringent the regulation. And a newly enacted regulation that eliminates all reasonable economic use will generally result in a taking, subject to several narrow but important exceptions, most notably for rules that parallel the background principles of nuisance and property law. *See Lucas*, 505 U.S. at 1027-28. These individual tests represent an evolutionary refinement of the 3-factor analysis described in *Penn Central* over twenty years ago. With these determinative, bright-line tests in place, there is no separate, ad hoc *Penn Central* analysis to apply.

Advocates of an expansive reading of the Takings Clause seek to defend the notion of an independent *Penn*

Central "partial" takings test by arguing that the ostensible *Penn Central* test entails a distinctive type of analysis relative to that required under *Lucas/Agins*, i.e. denial of economically viable use. The first purported ground for differentiating between these two tests and therefore justifying their separate continued existence is based on how the public purpose of a regulatory action should be analyzed in a takings case. In *Lucas*, the Court made clear that the weight of the public interest being served by a regulation is irrelevant in the taking analysis. 505 U.S. at 1026. On the other hand, according to proponents of the partial takings theory, in a taking case not covered by *Lucas*, the weight of the public interest has to be "balanced" against the burden being imposed on the owner.

However, a balancing of public and private interests cannot play a coherent role in any regulatory takings case. The Court has stated that a valid taking claim *presupposes* that the government is acting for a legitimate public purpose. *See First English Evangelical Lutheran Church v. City of Los Angeles*, 482 U.S. 304, 315 (1987). If a viable taking claim presupposes the government is acting for a legitimate public purpose, then the public purpose served by the regulation cannot logically be a factor to be weighed along with other factors in determining whether compensation is due under the Fifth Amendment.

This conclusion is also supported by common sense. The government's liability for a classic taking of property, such as for a school or some other public facility, does not vary with the importance of the public project. Indeed, it would be absurd to suggest that the government could deny its obligation to pay just compensation when it condemns land for a new school on the ground that the school will serve a pressing public need. The Fifth

Amendment has the same basic meaning whether the government initiates a condemnation or an owner brings an inverse condemnation action. *See First English*, 482 U.S. at 315. Accordingly, the value of the public objective being served by a regulatory program cannot have any relevance to the government's possible liability for a taking. Because the public value served by a regulation has no logical place in any takings case, the idea that the purported *Penn Central* analysis can be distinguished from the *Lucas/Agins* test because the former provides for consideration of the weight of the governmental purpose must be rejected as well.

A second possible basis for differentiating between the *Lucas/Agins* takings test and the ostensible *Penn Central* "partial" takings test is to treat the claimant's investment expectations (or the lack thereof) as a relevant factor under *Penn Central* but as an irrelevant consideration under the *Lucas/Agins* test. The flaw in this argument is that a lack of investment expectations should be an appropriate factor for the courts to consider in *any* type of takings case.

The basic rationale for treating a lack of expectations as a relevant factor in takings analysis is straightforward:

> In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171, 1177 (Fed. Cir. 1994). This reasoning applies to any sort of

regulatory taking case because awarding compensation to purchasers with notice could always result in unfair windfall payments at taxpayer expenses. Furthermore, treating expectations as irrelevant in a *Lucas/Agins*-type case would have the pernicious effect of encouraging owners to sell off small, wholly restricted pieces of their property to new owners who could (under this theory) sue for a taking even if the only business purpose of the transaction was to maximize recovery under the Takings Clause. In the end, this theory would force government to abandon many essential land use regulations, including restrictions on development on extremely steep slopes, in areas subject to mudslides, and on property containing critical environmental resources. *See also Ruckelshaus v. Monsanto Co., supra* (holding that a lack of investment-backed expectations can preclude a taking claim based on an alleged total taking of an intellectual property right).

In sum, there is no reasonable basis for concluding that a claimant's investment expectations could matter under the ostensible *Penn Central* test but could be disregarded in a *Lucas/Agins* case. Thus, this attempt to rationalize a two-tier taking analysis fails as well.

II. The Requirement that a Regulation Eliminate All Reasonable Use is Supported By Sound Constitutional and Legal Policy Considerations.

The Court's traditional view that a regulatory taking requires the elimination of the property's economic use is supported by (1) the language and original understanding of the Takings Clause; (2) federalism values; (3) the need for the judicial branch to defer to the people's

elected representatives on matters of social policy; (4) the pervasiveness of governmental "givings" and the "reciprocal" benefits of regulations; and (5) the need for the clear and predictable legal rules.

A. The Original Understanding of the Takings Clause Supports Use of the Single Basic Takings Test

First, the traditional reading of the Takings Clause is supported by the historical evidence concerning the original understanding of this constitutional provision.

As stated in *Lucas*: "early constitutional theorists did not believe the Takings Clause embraced regulations of property at all." 505 U.S. at 1028 n. 15. This conclusion is supported by numerous scholarly investigations including, for example, John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Nw. U. L. Rev. 1099 (2000) and William M. Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 Colum. L. Rev. 782 (1995). As these investigations explain, there is little direct evidence of the drafters' intentions in including the Takings Clause in the Bill of Rights. The provision was drafted by James Madison and included in the Bill of Rights at his instigation with no recorded debate. As a result, interpreters of the Takings Clause have been forced to resort to examining historical antecedents in colonial charters, the Northwest Ordinance and various state constitutions, as well as studying contemporary views about the scope of government authority to regulate the use of land and other property. The basic conclusion of this exhaustive research

has been that "the Takings Clause was originally intended and understood to refer only to the appropriation of property." Hart, 94 Nw. U. L. Rev. at 1103.

Existing Court precedent forecloses, at least for the present, a strict adherence to the original understanding of the Takings Clause. *See Pennsylvania Coal Co. v. Mahon, et al.*, 260 U.S. 393 (1922). In weighing petitioner's argument for a further expansion of regulatory takings doctrine, however, the original understanding is surely relevant. It is one thing to recognize that a regulation can effect a taking if it "has very nearly the same effect for constitutional purposes as appropriating or destroying it," *id.* at 414; it would be quite another to conclude that a regulation that leaves an owner reasonable economic use of the property can also effect a taking. The regulatory takings doctrine has a questionable constitutional foundation. Petitioner's proposed expansion of the doctrine would rob it of constitutional legitimacy altogether.

B. Federalism Values Support Use of the Single Basic Takings Test.

A second reason for rejecting petitioner's expansive regulatory takings theory is that it would conflict with federalism, one of the most important values enshrined in the Constitution. As the Court stated in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), "the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government." *Id.* at 457, quoting *Texas v. White*, 74 U.S. 700, 725 (1869).

Federalism promotes numerous values that are central to a free and pluralistic society. Among other things, "[i]t assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry." *Id.* at 458. *See also New State Ice Co v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (describing the states as the "laborator[ies]" of democracy).

The principle of federalism has long been central to the interpretation of the Takings Clause. The Court has recognized that "[p]roperty interests . . . are not created by the Constitution. Instead, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law." *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1001 (1984).

An expansive theory of regulatory takings, on the other hand, would tend to federalize property issues by imposing a stricter, uniform national standard upon the regulation of property. This, in turn, would undermine federalism itself by constraining the ability of state and local officials to adopt local solutions that respond to local needs and preferences. The broader the reading of the Takings Clause, the tighter the constitutional constraints on states and their subdivisions and the more the "laboratories" of democracy are undermined.

The federalism issue is brought into even sharper relief by the tension between petitioner's attempt to subject the State of Rhode Island to monetary liability under the Takings Clause and the Court's recent decision in *Alden v. Maine*, 527 U.S. 706 (1999), recognizing that the States are generally protected from federal-law suits for money damages based on sovereign immunity.[5] While the Takings Clause, of its own force, creates a federal right of action seeking "just compensation," *see First English Evangelical Lutheran Church v. City of Los Angeles, supra*, it is well established that the United States is immune from liability under the Takings Clause absent a specific waiver of its immunity. *See Lynch v. United States*, 292 U.S. 571, 579, 580-82 (1934). *See also Webster v. Doe*, 486 U.S. 592, 613 (1988) (Scalia, J., dissenting) ("No one would suggest that, if Congress had not passed the Tucker Act . . . , the courts would be able to order disbursements from the Treasury to pay for property taken under lawful

---

[5] Rhode Island did not originally raise a sovereign immunity defense in this case, perhaps in part because the case was briefed and argued in the Rhode Island Supreme Court prior to this Court's ruling in *Alden*. However, under state law, like under federal law, waiver of sovereign immunity protection must be deliberate. *Compare Edelman v. Jordan*, 415 U.S. 651, 673 (1974) *with Mulvaney v. Napolitano*, 671 A.2d 312 (R.I. 1995). The Rhode Island courts in interpreting the Rhode Island Takings Clause, like the federal courts in interpreting the federal Takings Clause, have apparently concluded that this provision, of its own force, creates a right of action for monetary relief. *See Annicelli v. Town of South Kingston*, 463 A.2d 133 (R.I. 1983). However, that determination does not address the separate issue of whether the State has deliberately waived its sovereign immunity.

authority (and subsequently destroyed) without just compensation."). In light of *Alden*, the States must be protected from suit under the Takings Clause based on sovereign immunity to the same extent as the federal government. The essential lesson of *Alden*, of course, is that the States, though more limited in power than the federal government, possess and are entitled to defend sovereign rights equal in importance and dignity to those possessed by the United States. *Cf. City of Monterey v. Del Monte Dunes Ltd.*, 526 U.S. 687, 714 (1999) (specifically recognizing but not definitively resolving the issue of State immunity from suit under the Takings Clause). *See generally* Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 Vand. L. Rev. 57, 137-39 (1999) (discussing sovereign immunity constraints on recovery for government takings).

C. The Tradition of Judicial Deference to the Democratic Branches Supports Use of the Single Basic Takings Test.

The expansive theory of regulatory takings also should be rejected because it would improperly expand judicial power at the expense of the other branches of government.

Petitioner's broad "partial" taking theory would seriously intrude upon, if not literally destroy the other branches of government. As Justice Oliver Wendell Holmes famously remarked: "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change

in the general law." *Mahon*, 260 U.S. at 413. In another case, the Court expanded on this theme:

> [G]overnment regulation – by definition – involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase.

Andrus v. Allard, 444 U.S. 51, 64 (1979)[6]

Petitioner's expansive regulatory taking theory also conflicts with the general presumption in favor of the constitutionality of legislative action, which is rooted in the doctrine of separation of powers and the general rule that matters of social policy should be decided by the

---

[6] It is sometimes asserted that an expansive reading of the Takings Clause does not intrude upon the legislative sphere because the clause is concerned not with whether the government can proceed with its programs, but instead with whether the government must pay "compensation" as a condition of doing so. This argument is pure sophistry. First, to require the government to pay in order to regulate fundamentally alters the intended character of the governmental action, from a restriction on use to a purchase of property. Second, as a practical matter, government, particularly at state and local levels, could not conceivably pay for every effect specific regulatory actions have on property values; thus a broad "compensation" requirement would have a direct and immediate effect on the permitted scope of legislative action. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J, concurring in the judgment and dissenting in part) (expansive regulatory takings liability could "subject[ ] States and municipalities to the potential of new and unforeseen claims in vast amounts"). *See generally* J. Peter Byrne, *Regulatory Takings and "Judicial Supremacy"*, 51 Ala. L.Rev. 949, 954 (2000).

people's elected representatives. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 524 (1998) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16-17 (1976)) ("[L]egislative [a]cts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality."). In a well known commentary on the judiciary's use of constitutional checks on majoritarian decision-making, then future Supreme Court Justice Robert Jackson wrote:

> [Electoral majorities] should, of course, be so restrained when [their] program violates clear and explicit terms of the Constitution, such as the specific prohibitions in the Bill of Rights. But to use vague clauses to import doctrines of restraint, such as "freedom of contract," is to set up the judiciary as a check on elections, a nullification of the process of government by consent of the governed.

Robert H. Jackson, *The Struggle for Judicial Supremacy* 319 (1941). More recently, Justice Scalia described the dangers of what he termed an "Imperial Judiciary" making constitutional decisions relating to abortion based on "philosophical predilections and moral intuitions" about issues properly left to the political process. He concluded:

> [B]y foreclosing all democratic outlet for the deep passions this issue arouses, by banishing the issue from the political forum that gives all participants, even the losers, the satisfaction of a fair hearing and an honest fight, by continuing the imposition of a rigid national rule instead of allowing for regional differences, the Court merely prolongs and intensifies the anguish.

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J., dissenting).

An expansive regulatory takings doctrine risks the same kind of judicial intrusion into legislative decision-making that characterized the application of Due Process principles during the ill-fated era of *Lochner v. New York*, 198 U.S. 45 (1905). *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998) (O'Connor, J., plurality opinion) (noting that "this Court has expressed concerns about using the Due Process Clause to invalidate economic legislation," citing *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963), and *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 488 (1955)). The risk would not be reduced by substituting the takings label for the due process label. *Cf. Id.* at 544 (Kennedy, J. concurring in the judgment and dissenting in part) ("If the plurality is adopting its novel and expansive concept of a taking in order to avoid making a normative judgment about the Coal Act, it fails in the attempt; for it must make the normative judgment in all events.")[7]

In sum, petitioner's expansive theory would require this Court to routinely second-guess the fairness of legislation enacted by state and local governments and cannot be squared with the traditional function of the judicial branch under our system of separation of powers.

---

[7] In *Florida Rock Industries*, the Federal Circuit, responding to the criticism that the Circuit's "partial taking" theory was too expansive, stated that, "What is necessary is a classic exercise of judicial balancing of competing values." *Id.* at 1570. Within our constitutional system, the task of balancing competing values belongs to the legislature, not the courts.

D. "Givings" and "Reciprocity of Advantage" Support Use of a Single Basic Takings Test.

The partial regulatory taking theory also must be rejected because it fails to take into account either how regulatory programs confer a "reciprocity of advantage" upon property owners or governmental "givings". Consideration of these factors demonstrates that the partial regulatory taking theory is unnecessary to correct any systematic unfairness to landowners and that adoption of the partial taking theory would result in unfair windfalls to landowners at taxpayer expense.

The term "reciprocity of advantage," coined by Justice Holmes, refers to the benefits property owners receive from regulatory programs, both in their status as regulated owners and as members of society as a whole. As the Supreme Court stated in *Agins*, property owners "share with other owners the benefits and burdens of the city's exercise of its police power." In assessing the "fairness" of exercises of the police power, "these benefits must be considered along with any diminution in market value that the [owners] might suffer." 447 U.S. at 262; *see also Andrus v. Allard*, 444 U.S. at 67 (taking claim failed because the restriction was "a burden borne to secure the advantage of living and doing business in a civilized community"); *Keystone Bituminous Coal*, 480 U.S. at 491:

> Under our system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.

In addition to the phenomenon of reciprocity of advantage, governmental "givings" also should be considered in weighing the ostensible fairness arguments on behalf of the partial regulatory taking theory. Public funding of construction of schools, roads, sewers, and other public facilities contribute significantly to the value of land. While all taxpayers contribute to these givings, particular landowners often receive disproportionate benefits from these public investments.

Given regulation's reciprocal effects and the pervasiveness of governmental givings, awarding compensation based on partial reductions in value would run a high risk of "compensating" an owner for an injury that, in a fundamental sense, did not occur. Advocates of an expansive view of takings often rest their arguments on notions of fundamental "fairness." However, a comprehensive and accurate picture of how governmental actions actually affect property values rebuts this argument.

E. The Practical Need for Bright Line Legal Tests Supports Use of The Single Basic Takings Test.

Finally, petitioner's "partial" takings theory must be rejected because of the need for the courts to draw clear and predictable lines in order for the rule of law to be able to function at all. The rule that a regulation must eliminate all reasonable use satisfies this need because it identifies a relatively discrete and fairly easily identified set of cases. If the law were otherwise, and if a taking could be established merely by showing that a regulation has gone "too far," or that the owner has suffered a

"substantial" loss, the law of takings would be a highly unpredictable morass, for landowners and government officials alike.

The importance of bright line rules in regulatory takings doctrine is confirmed by the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In that case, the Court justified the adoption of a "per se" rule for "permanent physical occupations" of private property on the ground that it "avoids otherwise difficult line-drawing problems." 458 U.S. at 436. The Court said that a per se physical-occupation takings rule, even if somewhat over-broad, is justified because it "presents relatively few problems of proof," *id.* at 437, and avoids the need for intensive examination of the facts of each particular case.

In the same fashion, confining regulatory takings doctrine to the total-loss case also avoids difficult line-drawing problems. Even if there were some occasional alleged "partial" takings that seemed to call out for a judicial remedy, the impulse to address these claims has to be considered in light of the advantages, for the regulated and the regulator alike, of a clear and well-defined legal line. Just as the Court's rule for physical occupations is somewhat over-inclusive, the requirement that a regulation eliminate all reasonable economic use might be viewed by some as under-inclusive. But for the rule of law to prevail, the law needs to speak in clear and unmistakable terms. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989); *cf. National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe*

Ry. Co., 470 U.S. 451, 477 (1985) (observing that the Constitution does not require that Congress "select the scheme that a court later would find to be the fairest").

Professor Frank Michelman's seminal article, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1196 (1967), contains language which speaks eloquently to the need for takings doctrine to include clear legal rules. In his article, which probably has been cited more frequently by the Court than any other work on this subject, Michelman surveyed at great length the various factors that he thought relevant to analyzing the fairness issues at the heart of a taking case. In the concluding section of his article, Professor Michelman cautioned that a free-wheeling analysis of fairness along the lines he outlined was unlikely to supply a suitable judicial standard. In a passage strikingly relevant to the issue now before this Court, he wrote:

> This is not to say that courts cannot usefully be put to work deciding at least some compensability issues. It is rather to suggest abandonment of any idea that courts can or will decide each compensability case directly in accordance with the precept of fairness. Hence, we need to search instead for some workable, impersonal rule believed to approximate in a useful proportion of cases the same result that fairness would dictate. But if that is our choice (or our preferred description of what actually takes place) it is of the utmost importance that we clearly and frankly acknowledge it. The danger here is one of behaving as if courts were doing the whole job when the truth is that they are attentive only

> to "hard core" or "automatic" cases. To illustrate: a utilitarian approach to the problem might suggest a judicial rule that compensation is due only when there has been either (a) a physical occupation or (b) a nearly total destruction of some previously crystallized value which did not originate under clearly speculative or hazardous conditions. Such a rule would be workable; it would be internally consistent; and it would be ethically inoffensive as far as it goes. True, its cut-off points are arbitrary, and it completely disregards some significant but less discussable dimensions of fairness. But these attributes in the rule would merely reflect its function as a rule for courts to use in the partial performance of a task for which judicial capabilities are not fully adequate.

80 Harv. L. Rev. at 1250-51. Professor Michelman articulates a practical understanding of how the law must translate notions of fairness into a bright-line test and provides powerful support for the Court's traditional test requiring the elimination of all reasonable economic use of the property.

CONCLUSION

For the foregoing reasons, the Board urges the Court to affirm the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

MICHAEL A. GOLDMAN*
JEFFERY P. ROBBINS
GOLDMAN, ROBBINS & ROGERS, LLP
850 Main Avenue
Durango, Colorado 81301
(970) 259-8747

Counsel of Record for Amicus Curiae

January 3, 2001.

JAN 3 2001

Supreme Court, U.S.
FILED
JAN 3 2001

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND ex rel PAUL J. TAVARES, GENERAL TREASURER, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF DR. JOHN M. TEAL, DR. FRANK GOLET, DR. JON C. BOOTHROYD, DR. R. SCOTT WARREN, DR. SCOTT NIXON, DR. JOY ZEDLER AND DR. ORRIN PILKEY IN SUPPORT OF RESPONDENT

TIM EICHENBERG,
Program Counsel
CENTER FOR MARINE CONSERVATION
580 Market Street,
Suite 550
San Francisco, CA 94104
(415) 391-6204

Of Counsel

PATRICK A. PARENTEAU*
VERMONT LAW SCHOOL
South Royalton, VT 05068
(802) 763-8303

**Counsel of Record*
Attorney for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT..... 1

ARGUMENT 2

A. The Functions and Values of the Salt Marsh Ecosystem 2

B. The Ecological Effects of Salt Marsh Destruction .. 10

C. Water Quality and Public Health Impacts of Coastal Development 13

D. The Hazards of Coastal Development..... 16

CONCLUSION 22

APPENDIX A .....App. 1

TABLE OF AUTHORITIES

Page

CASES

Lucas v. South Carolina Coastal Commission, 505 U.S. 1003 (1992) 1

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 4

STATUTES

Federal

16 U.S.C. 1331 5

16 U.S.C. 1451 20

16 U.S.C. 1452(1) 20

16 U.S.C. 1452(2) 20

16 U.S.C. 1455b 21

16 U.S.C. 1455b(c)(3) 21

16 U.S.C. 1455b(g)(5) 21

42 U.S.C. 4784 21

Rhode Island

P.L. 1965 ch. 140, § 1, G.L. 1956 §§ 2-1 – 2-17 10

P.L. 1971 ch. 279 § 1, G.L. 1956 ch. 23 of title 46 11

Rev. Pub. Laws, pp. 492-97 (1798) 11

G.L. 1938 ch. 634, § 1 11

OTHER AUTHORITIES

Brown, C., *Hurricanes and Shoreline Changes in Rhode Island*, Hurricane in Southern New England (Gordon, B., ed.) (1976) 17

TABLE OF AUTHORITIES – Continued

Page

Chabreck, R.H., Coastal Marshes: Ecology and Wildlife Management (1988) 3

Coastal Resources Management Council, Rhode Island's Salt Pond Region: A Special Area Management Plan (1984) 13

Coastal Resources Management Council, Rhode Island's Salt Pond Region: A Special Management Plan (Maushaug to Point Judith Ponds) (1999) 14, 15

Dahl, T.E., Wetlands: Status and Trends in the Coterminous United States, mid 1970's to mid 1980's, U.S. Department of the Interior (1991) 10

Desbonnet, A.P., *et al.*, Vegetated Buffers in the Coastal Zone: A Summary Review and Bibliography, University of Rhode Island Coastal Resources Center and Rhode Island Sea Grant (1994) 15

Frayer, W.E., *et al.*, Status and Trends of Wetlands and Deepwater Habitats in the Coterminous United States, 1950's to 1970's, U.S. Department of Interior (1983) 10

Friedman, R.M. and DeWitt, C.B., *Wetlands as Carbon and Nutrient Reservoirs: A Spatial, Historical, Social Perspective*, Wetland Functions and Values: The State of Our Understanding, Proceedings of the National Symposium on Wetlands, November 7-10, American Water Resources Assn. (1979) 7

Greeson, P.B, *et al.*, *Wetland Functions and Values: The State of Our Understanding*, Proceedings of the National Symposium on Wetlands, November 7-10, American Water Resources Assn. (1979) 6

TABLE OF AUTHORITIES – Continued

Page

Hay, John, *An Imagined Frontier,* The Great Beach (1964) 9

The J. John Heinz III Center for Science, Economics and the Environment, The Hidden Costs of Coastal Hazards (2000) 16

Hoffman, J.S., Keyes, D. and Titus, J.G., Projecting Future Sea Level Rise, U.S. Environmental Protection Agency (1995)..... 19

IPCC Working Group I, The Science of Climate Change (Second Assessment Report) (1995) 18

IPCC, Report to the Sixth Conference of the Parties of the United Nations Framework Convention on Climate Change (Nov. 20, 2000)..... 8

IPCC, Special Report on Land Use, Land Use Changes, and Forestry (1998) 8

Kana, T.W., *et al., The Physical Impact of Sea Level Rise in the Area of Charleston, South Carolina,* in Barth and Titus, Greenhouse Effect and Sea Level Rise: A Challenge for This Generation (1984) 19

Knudson, P.L., *et al., Wave Dampening in Spartina Alterniflora Marshes, Wetlands (Journal of the Society of Wetland Scientists)* 2 (1982)..... 7

Lee, G.F., *et al., Effects of Marshes on Water Quality,* in Coupling of Land and Water Systems (A.D. Hastler, ed.) (1975) 5

Lee, Virginia, An Elusive Compromise: Rhode Island Coastal Ponds and Their People (1980)..... 13

Lee, Virginia and Olson, Stephen, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons, Estuaries* Vol. 8 No. 2B (1995)..... 14

TABLE OF AUTHORITIES – Continued

Page

Myshrall, D.H.A., *et al., Salt Marsh Restoration Monitoring at the Galilee Bird Sanctuary, Narragansett, R.I.* (2000) 5

Niering, W.A., *Endangered, Threatened, and Rare Wetland Plants and Animals of the Continental United States, National Wetlands Newsletter* (May-June 1987)..... 5

Nixon, Scott W., *Coastal Marine Eutrophication: A Definition, Social Causes, and Future Concerns, Ophelia* 41 (1995) 14

Nixon, S.B., *et al., Nutrient Inputs to Rhode Island Coastal Lagoons and Salt Ponds: Final Report to Rhode Island Statewide Planning* (1982) 13

Nixon and Pilson, *Nitrogen in Estuarine and Coastal Marine Ecosystems,* Nitrogen in the Marine Environment (1983) 13

Oceans and Coastal Resources: A Briefing Book, 23 Congressional Research Service Rep. 97-588ENR (1997)..... 4, 16

Office of Technology Assessment, *Wetlands: Their Use and Regulation* (1984) 10

Opheim, T., *Wetland Losses Have Continued but Have Slowed, National Wetlands Newsletter* (Nov.-Dec. 1997)..... 10

Peters, R., and Lovejoy, T., Global Warming and Biological Diversity (1993) 19

The Providence Journal, Sept. 8, 1954 18

TABLE OF AUTHORITIES – Continued

Page

Revkin, A., *Scientists Now Acknowledge Role of Humans in Climate Change, The New York Times* (October 26, 2000) 18

State of Rhode Island Coastal Resource Management Plan (1990) 10

Teal, J.M., *Salt Marshes: They Offer Diversity of Habitat*, 14 *Oceanus* (1996) 4

Teal, John and Mildred, Life and Death of the Salt Marsh (1969) 3

Tiner, R.W., *Wetlands of Rhode Island, U.S. Fish and Wildlife Service, National Wetlands Inventory* (1989) 3, 6

Titus, J.G. and Narayanan, Vijay, *The Probability of Sea Level Rise*, U.S. Environmental Protection Agency (1995) 19

Titus, J.G., *et al.*, *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea, Coastal Management*, 19 (1991) 19

U.S. Army Corps of Engineers, *Hurricane Survey Interim Report, Narragansett Pier, Rhode Island*, GPO (1960) 18

U.S. Environmental Protection Agency, *National Water Quality Inventory: 1994 Report to Congress* (1995) 13

U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* (1997) 9

STATEMENT OF INTEREST

Pursuant to Supreme Court Rule 37, we file this brief with the consent of the parties as amici curiae in support of Respondent, the State of Rhode Island.[1]

Amici are distinguished scientists with special expertise in America's coastal and estuarine ecosystems. Scientists authoring this brief include members of the National Academy of Sciences, and leading authors on estuaries, salt marshes, salt ponds, water quality, coastal barrier systems, and coastal hazards. Amici include scientists who have served on scientific panels advising government bodies on management of coastal ecosystems. Several have direct experience with the Rhode Island Coastal Resources Management Program and are quite familiar with the physical setting of this case and with the scientific and technical issues presented. Appendix A contains a brief biography of each scientist.

SUMMARY OF ARGUMENT

This Court has recognized that "coastal property may present such unique concerns for a fragile land system" that a state may be justified in restricting inappropriate development in the most sensitive and hazardous areas without running afoul of the Fifth Amendment. *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1035 (1992) (Justice Kennedy, concurring). As the majority in

[1] This brief was not authored in whole or in part by counsel for a party. The Beldon Fund contributed $2500 towards the cost of preparing and printing this brief.

Lucas pointed out, it is important, when evaluating regulatory takings claims, to carefully consider the "degree of harm to public lands and resources, or adjacent private properties, posed by the claimant's proposed activities," as well as "their suitability to the location in question." *Id.* at 1031. The following information is intended to provide the Court with a clearer picture of the geographical, ecological, and hazardous conditions that make the salt marsh ecosystem precisely the kind of place that is not suitable for the intensive and poorly planned development Petitioner wishes to put there.

ARGUMENT

A. The Functions and Values of the Salt Marsh Ecosystem.

Viewed from above, the coastline of Rhode Island, like much of the eastern seaboard, reveals a striking mosaic of interconnected geological features and biological systems. Barrier beaches and coastal dunes front the ocean, absorbing the sometimes violent energy of wind and waves in their shifting sands. Behind the dunes lie the great salt ponds, brimming with life, running parallel to the coast like a string of pearls. Arrayed along the back of these barrier ponds and along the tributaries and embayments are the salt marshes, blanketed in tidally-influenced grasses (*Spartina alterniflora*), the principal food factory for this rich estuarine system. Woven into

this natural fabric are uplands and dunes, adding still more diversity.[2]

This is a remarkable landscape: dynamic, diverse, productive, beautiful, dangerous. Here the work of nature is spectacularly displayed, bestowing rich gifts upon the human inhabitants. One of the keystones of this coastal environment, and the focus of the controversy here, is the salt marsh ecosystem. Salt marshes are among the most biologically productive ecosystems on earth, rivaling the richest agricultural land in terms of organic output.[3] Salt marshes are the "primary producers" that fuel the complex web of life within the coastal estuarine system, while providing a critical nursery and "refugia" for fish and shellfish of enormous economic and cultural importance. But these systems do much more than simply produce biomass. A partial inventory of the functions and values of this ecological system would include the following.

Fish and Wildlife Habitat

As this Court has previously recognized, wetlands "serve significant natural biological functions including food chain production, general habitat, and nesting, spawning, rearing, and resting sites for aquatic species."

---

[2] *See generally*, John and Mildred Teal, Life and Death of the Salt Marsh (1969); Chabreck, R.H., Coastal Marshes: Ecology and Wildlife Management, 21-28 (1988).

[3] Tiner, R.W., *Wetlands of Rhode Island, U.S. Fish and Wildlife Service, National Wetlands Inventory*, 59-60 (1989) (hereafter, *Wetlands of Rhode Island*).

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985).

Salt marshes are the crown jewels of wetlands, supporting an extensive complex of terrestrial and marine biological diversity by providing a variety of habitats and landscapes at the edge of the sea.[4] Many different life forms – aquatic, terrestrial, marine, freshwater – come together in this transition zone. The marsh integrates land and sea, pulsing with life in rhythm with the tides.

Approximately 70% of the commercial fisheries in the United States depend on estuaries and salt marshes for nursery or spawning grounds.[5] In 1995, the commercial fishery catch totaled 4.5 million metric tons and was valued at a record $3.8 billion.[6] Seafood is a significant component of the American diet, and a major sector of the economy. In 1995, Americans consumed an average of 15 pounds of seafood per person, and spent a total of $38.6 billion.[7]

Coastal wetlands are crucial for the existence of many birds, ranging from waterfowl, wading birds, and shorebirds to wetland-dependent songbirds. Some spend their entire lives in wetland environments, while others

---

[4] Teal, J.M., *Salt Marshes: They Offer Diversity of Habitat*, 14 *Oceanus* 13 (1996)

[5] *Id.* at 55. Among the more familiar wetland-dependent fishes are menhaden, bluefish, flounder, white perch, sea trout, mullet, croaker, striped bass, and drum.

[6] *Oceans and Coastal Resources: A Briefing Book*, 23 Congressional Research Service Rep. 97-588ENR (1997) (Hereafter, *Oceans and Coastal Resources*)

[7] *Id.* at 35.

primarily use these areas for breeding, feeding or resting.[8]

The survival of many rare, threatened and endangered plants and animals depends upon coastal marshes. About 50% of the animals and 28% of the plants listed as threatened and endangered species under the Endangered Species Act, 16 U.S.C. § 1331, are wetland-dependent.[9] According to the Rhode Island Natural Heritage Program, approximately one-third of all the State's rare plants occur in salt marshes and estuarine waters.[10]

Water Quality

Wetlands help maintain water quality in several ways: (1) by removing, retaining, and transporting nutrients such as nitrates and phosphates, (2) by processing chemical and organic waste, and (3) by reducing sediment loads.[11] Wetlands are particularly good water filters because of their location between fast land and open

---

[8] A recent survey of birds at the Galilee Bird Sanctuary in Narragansett, R.I. revealed 76 species of waterbirds and 42 species of landbirds. Key wetland-dependent breeding birds included Green Heron, American Black Duck, Mallard, Clapper Rail, King Rail, Killdeer, Willet, Marsh Wren, and Saltmarsh Sharp-tailed Sparrow. Myshrall, D.H.A. *et al.*, *Salt Marsh Restoration Monitoring at the Galilee Bird Sanctuary, Narragansett, R.I.*, 17-19 (2000)

[9] Niering, W.A., *Endangered, Threatened, and Rare Wetland Plants and Animals of the Continental United States, National Wetlands Newsletter*, 16-19 (May-June 1987)

[10] *Id.* at 55.

[11] Lee, G.F. *et al.*, *Effects of Marshes on Water Quality*, in Coupling of Land and Water Systems (A.D. Hastler, ed.) (1975)

water. They can intercept runoff from land before it reaches water and help filter-out nutrients, wastes and sediment.[12]

Perhaps the best known demonstration of the purifying capabilities of wetlands is Tinicum Marsh, a 512 acre tidal marsh lying south of Philadelphia, Pennsylvania. Three sewage treatment plants discharge treated waste into the marsh. On a daily basis, the marsh removes 8 tons of biological oxygen demanding waste, 5 tons of phosphorous, 4 tons of ammonia, and 138 pounds of nitrate. In addition, the marsh adds 20 tons of oxygen to the water each day.[13]

Coastal wetlands also play a valuable role in reducing turbidity of flooding waters. This is especially important for aquatic life and for reducing siltation of ports, harbors, rivers, and reservoirs. Removal of sediment load is also valuable because sediments often transport adsorbed nutrients, pesticides, heavy metals, and other toxins.

Flood and Shoreline Erosion Control

Coastal areas are particularly susceptible to floods and storms, as discussed in greater detail below. Coastal

---

[12] *See generally*, Greeson, P. B. *et al.*, *Wetland Functions and Values: The State of Our Understanding*, Proceedings of the National Symposium on Wetlands, November 7-10, American Water Resources Assn. (1979) (Hereafter, *Wetland Functions and Values*)

[13] *Wetlands of Rhode Island*, *supra* n.3, at 58.

marshes and floodplains, because of their strategic location between the open ocean and upland, help protect upland areas from erosion while providing other valuable ecosystem services. Wetland vegetation can reduce shoreline erosion in several ways, including (1) anchoring sediments, (2) dampening wave action through friction, and (3) reducing current velocity through friction.[14] Coastal marshes and barrier beaches are far more resilient to erosion than adjacent upland areas. They tend to recover over time as a result of sedimentation and accretion induced by tidal flow during quiet periods. Uplands, once eroded, have little or no potential for recovery except through human effort. The economic benefits of these functions are substantial. Property owners within the coastal zone receive reciprocal benefits from maintaining the integrity of these natural flood control and storm buffering features of the salt marsh ecosystem.

Climate Control

Wetland soils typically are highly organic and serve as "sinks" for carbon.[15] As these soils are drained or otherwise disturbed, they tend to oxidize, releasing carbon dioxide to the atmosphere and contributing to global warming. An overwhelming majority of scientists now

---

[14] Knudson, P.L., *et al.*, *Wave Dampening in Spartina Alterniflora Marshes*, *Wetlands (Journal of the Society of Wetland Scientists)* 2:87-104 (1982)

[15] Friedman, R.M. and DeWitt, C.B., *Wetlands as Carbon and Nutrient Reservoirs: A Spatial, Historical, Social Perspective*, in *Wetland Functions and Values*, *supra* n.12, at 175-85.

believe that anthropogenic (human) sources of carbon dioxide and other "greenhouse gases" are at least partly responsible for the documented increases in the earth's temperatures and changing weather patterns around the globe.[16] The Intergovernmental Panel on Climate Change (IPCC), a United Nations advisory group comprised of 2500 scientists, recently revised their projected warming trends upwards with a consequent increase in negative environmental impacts from such effects as rising sea levels. It is now widely accepted that sequestration of carbon in natural systems such as wetlands and forests is a critical component of any successful strategy to deal with the pressing problem of global warming.[17]

Recreation and Aesthetics

Many recreational activities take place in or around wetlands. Hunting and fishing contribute significantly to the local and national economies. In 1996, 77 million U.S.

---

[16] As the Chairman of the Intergovernmental Panel on Climate Change recently reported to the United Nations:

> [T]he overwhelming majority of scientific experts, whilst recognizing that scientific uncertainties exist, nonetheless believe that human-induced climate change is already occurring and that future change is inevitable. It is not a question of whether the Earth's climate will change, but rather by how much, how fast and where.

IPCC, Report to the Sixth Conference of the Parties of the United Nations Framework Convention on Climate Change, November 20, 2000.

[17] See, IPCC, Special Report on Land Use, Land Use Changes, and Forestry (1998)

residents participated in wildlife-related recreation activities.[18] During that year 35.2 million people fished, 14 million hunted, and 62.9 million enjoyed at least one type of wildlife-watching activity. Expenditures associated with wildlife-related recreation totaled $101 billion in 1996.[19]

It is much harder to put a dollar value on the sheer beauty of the coast, and the sense of awe and wonder it inspires. Perhaps the image painted by naturalist-author John Hay will suffice:

> I sat on the sands and listened to the sonorous heave and splash of low waves. The sun, like a colossal red balloon filled with water, was sinking in to the horizon. It swelled, flattened, and disappeared with a final rapidity, leaving a foaming, fiery band behind it. I suddenly heard the wild trembling cry of a loon behind me, and then saw it fly over heading north. The wind grew cool, after a hot day when the light shone on metallic, glittering slow waters, and sharp, pointed beach grasses clicked together, while I watched the darkness fall around me.[20]

---

[18] U.S. Fish and Wildlife Service, *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation*, 4 (1997).

[19] *Id.*

[20] John Hay, *An Imagined Frontier*, in The Great Beach (1964)

B. The Ecological Effects of Salt Marsh Destruction

According to current estimates by the U.S. Fish and Wildlife Service (USFWS), only 5.1 million acres of estuarine inter-tidal wetlands remain in the coterminous United States.[21] This figure represents about 5% of the nation's total wetlands resource.[22]

Between the 1950's and 1970's, New England saw a major loss of coastal wetlands. For example, some 10 % of Rhode Island's coastal wetlands greater than 40 acres were filled between 1955 and 1964.[23] In response, coastal states began enacting wetlands protection laws. Rhode Island passed the nation's first Inter-tidal Salt Marsh Act in 1965. P.L. 1965 ch. 140, sec 1, G.L. 1956 sec 2-1 through 2-17. In 1971, Rhode Island became the first state to enact

---

[21] Opheim, T., *Wetland Losses Have Continued but Have Slowed, National Wetlands Newsletter*, 7-9 (November-December 1997)

[22] Nationwide, wetlands have been disappearing at a rapid rate throughout most of the nation's history. USFWS estimates that 104 million acres remains of the 220 million that existed when the country was first settled. Office of Technology Assessment, *Wetlands: Their Use and Regulation*, 87 (1984). Between the 1950's and 1970's the rate of loss was over 500,000 acres per year. Frayer, W.E., *et al.*, Status and Trends of Wetlands and Deepwater Habitats in the Coterminous United States, 1950's to 1970's, U.S. Department of Interior (1983). This trend has slowed considerably thanks to stronger wetland protection laws. Between 1985 and 1995, the net loss was 117,000. *See*, Dahl, T.E., Wetlands: Status and Trends in the Coterminous United States, mid 1970's to mid 1980's U.S. Department of the Interior (1991)

[23] The *State of Rhode Island Coastal Resource Management Plan*, 57 (1990)

a comprehensive Coastal Resources Management Act, which established the Coastal Resource Management Council (CRMC). P.L. (1971) ch.279 sec 1, G.L. (1956) chapter 23 of title 46. In fact, Rhode Island's concern for protecting coastal resources dates back even further. There were laws on the books as early as 1798 protecting salt ponds. Rev. Pub. Laws, pp 492-97 (1798). Since 1938, the state has prohibited the introduction of "every substance that would injuriously affect the natural and healthy propagation, growth, or development of any fish or shellfish in the waters of the state." G.L. (1938) ch. 634, Sec 1.

Today the major causes of coastal wetland losses are urban development and encroachment of coastal water caused by dredging projects, impoundments, and sea level rise. The case at bar is an example of the kind of development that would do great damage to our remaining salt marshes. Petitioner seeks permission to construct a bulkhead on the shore of Winnapaug Pond and fill approximately 18 acres of salt marsh in order to create a 74 lot subdivision. The marsh on Petitioner's property is part of a 160 acre salt marsh complex that extends from Weekapaug on the east to Misquamicut on the west, bordering the southern shore of Winnapaug Pond. J.A. 7. The record reveals that this is "one of the more valuable tidal salt marshes in Rhode Island." J.A. 35. The marsh is "extremely valuable in terms of plant species that grow there and as habitat for birds." J.A. 35. According to the Field Biologist's report:

> There is overwhelming evidence that the biological communities indigenous to this coastal wetland will be seriously and deleteriously effected

(sic) by the proposed filling and bulkheading activity. Valuable wildlife habitat will be destroyed outright, habitat necessary for the survival and maintenance of the shellfish and finfish populations will be lost, and there is a very reasonable probability that a species of bird and two species of plants now listed as species of significance will be eliminated from the area. J.A. 4.

The 18 acres of marsh on Petitioner's property represents 12% of the salt marsh associated with Winnapaug Pond. Given the relatively small size (approximately 2000 acres) of the pond's watershed, this is a "highly significant number" according to the expert testimony before the Rhode Island Coastal Resources Management Council (CRMC). (J.A. 35) Filling the marsh "would destroy the natural shoreline protection, decrease sediment trapping and accretion, decrease flood storage, and eliminate or greatly reduce nutrient retention." (J.A. 27)

The impacts on Winnapaug Pond are cause for serious concern. Salt ponds are shallow, productive estuarine embayments separated from the ocean by a narrow barrier spit. They provide prime habitat for commercial and recreational fish and shellfish, as well as resting and feeding stops for waterfowl, wading birds, shorebirds and other wetland-dependent birds migrating along the Atlantic flyway. Rhode Island's salt ponds have been an important source of fish and shellfish for people long before recorded histories. Archeological evidence from the 1600's indicates the tremendous bounty yielded to the native peoples that first used these areas and to the

colonists that followed.[24] These ponds have been an important factor in the quality of life for local residents and a prime recreational attraction for tourists in the region.

C. Water Quality and Public Health Impacts of Coastal Development

Rhode Island's salt pond region, which includes Winnapaug Pond, is especially vulnerable to water quality problems related to the density and distribution of development within the relatively small watersheds of the ponds.[25] Bacterial contamination and nutrient enrichment are the primary threats to water quality. Indeed, these are the principal water quality problems of other estuaries all along our nation's coasts. More square miles of estuarine waters are polluted by nutrients and bacteria than any other type of contaminant.[26]

Sewage disposal through septic systems is a major documented source of nitrogen and bacteria loading for many coastal environments.[27] Failing and substandard

---

[24] Virginia Lee, An Elusive Compromise: Rhode Island Coastal Ponds and Their People, 22 (1980)

[25] Coastal Resources Management Council, Rhode Island's Salt Pond Region: A Special Area Management Plan, 25 (1984).

[26] U.S. Environmental Protection Agency, *National Water Quality Inventory: 1994 Report to Congress*, 11 (1995)

[27] Nixon, S.B., *et al.*, *Nutrient Inputs to Rhode Island Coastal Lagoons and Salt Ponds: Final Report to Rhode Island Statewide Planning* (1982); Nixon and Pilson, *Nitrogen in Estuarine and Coastal Marine Ecosystems*, in Nitrogen in the Marine Environment (1983)

individual sewage disposal systems (ISDS) and resultant contaminated runoff are the principal sources of bacterial contamination to the salt ponds. In fact ISDS' contribute almost ten times as much as any other source of nitrogen.[28] Most of the existing residential and commercial development in the salt pond region, including the Winnapaug Pond watershed, rely upon ISDS for disposal of sewage. Petitioner's development would also rely on ISDS. J.A. 8

Excess input of nutrients leads to eutrophication of water bodies. In marine ecosystems nitrogen is the essential nutrient that stimulates plant growth. As nutrient loading increases in salt ponds, massive growth of algae occurs and the dissolved oxygen necessary for aquatic life is depleted. During extreme low oxygen events, hypoxia (less than 3 mg of oxygen per liter) or anoxia (all the dissolved oxygen is consumed) can occur with consequent fish kills, reduced biodiversity of fish and shellfish populations, mass mortality of benthic organisms, bacterial slimes, foul smelling odors, and in some cases toxic levels of hydrogen sulfide.[29] Eutrophication of estuaries has become a major issue in Rhode Island and other coastal states.[30]

---

[28] CRMC, Rhode Island's Salt Pond Region: A Special Management Plan (Maushaug to Point Judith Ponds), ch. 1, at 6 (1999) (Hereafter, *Salt Pond SAMP*).

[29] Nixon, Scott W., *Coastal Marine Eutrophication: A Definition, Social Causes, and Future Concerns, Ophelia* 41:199-219 (1995)

[30] Virginia Lee and Stephen Olson, *Eutrophication and Management Initiatives for the Control of Nutrient Inputs to Rhode Island Coastal Lagoons, Estuaries* Vol. 8 No. 2B, 191-202 (1995)

Excess loading of nitrogen to groundwater also creates serious public health problems. Nitrogen in groundwater takes the form of nitrate, a very stable anion that is relatively unaffected in the subsurface environment. A high level of nitrate in groundwater is a public health problem since groundwater is the sole source of drinking water for public water supplies and private wells throughout the salt pond region.[31] In some areas around salt ponds, nitrate levels already exceed safe thresholds for drinking water.[32]

In inland areas, the solution to these problems might be to build a public sewer system. However, sewer systems encourage high density development and increase runoff contamination of adjacent water bodies. Sewers are an appropriate solution for urbanized areas where other alternatives are no longer available, but not for areas such as the salt pond region where less dense development is both feasible and desirable. Adequate buffer zones are needed around the salt ponds, their tributaries and wetlands to help control nitrogen contamination.[33]

---

[31] *Salt Pond SAMP, supra* n.28, at Ch 3.

[32] *Id.*

[33] Desbonnet, A.P., *et al.*, Vegetated Buffers in the Coastal Zone: A Summary Review and Bibliography, University of Rhode Island Coastal Resources Center and Rhode Island Sea Grant, 61 (1994).

D. The Hazards of Coastal Development

People are drawn to the coast. Nearly 50% of the U.S. population resides in coastal areas.[34] From 1960-1990, the population in U.S. coastal areas increased from 80 to 110 million and is projected to reach 127 million by 2010.[35] Significant economic activity and growth has occurred as coastal residential, commercial, and recreational development has accelerated in recent decades. For example, approximately 50% of annual U.S. residential construction during the past two decades occurred in coastal areas.[36] Much of this development has been encouraged, whether intentionally or not, by government-funded infrastructure developments such as highways, water and sewer service, causeway access, and beach nourishment.[37] Federal programs such as the National Flood Insurance Program and the Federal Disaster Assistance Program have subsidized the risk of loss from floods and storms.[38]

This increasing concentration of development along the Nation's coasts entails a risk to life and property from major storms. For example, hurricane Andrew, one of the most devastating natural disasters to strike the United States, roared across southern Florida and into the low-

---

[34] *Oceans and Coastal Resources, supra* n.6, at 41.

[35] *Id.*

[36] *Id.*

[37] The H. John Heinz III Center for Science, Economics and the Environment, The Hidden Costs of Coastal Hazards, 19 (2000).

[38] *Id.*

lying coastal areas of Louisiana in August 1992, destroying 28,000 homes, leaving 180,000 temporarily homeless, and affecting the lives of 275,000 residents of these two states.[39] This one storm did an estimated $30 billion in damage. Hurricane Hugo, the 1989 storm that struck the U.S. Virgin Islands and Puerto Rico, and came ashore at Charleston, South Carolina, caused damage estimated at $6 billion.[40] On average, two hurricanes strike the U.S. coast each year, with two intense storms (like Andrew and Hugo) hitting every three years.

Rhode Island is particularly susceptible to hurricane damage. Unlike many Atlantic coastal states, its ocean shoreline runs east-west and lies exposed to the full force of a tropical storm approaching from the south. It is directly in the path of most hurricanes that reach New England before the storm tracks veer east over the North Atlantic, and it is unprotected by large islands such as Long Island, Fisher's Island or Martha's Vineyard that lie off other stretches of mainland to the north and south.[41]

In the Great Atlantic Hurricane of 1938, the southern shore of Rhode Island experienced winds and waves of the greatest speed and height recorded anywhere in New England.[42] Over 300 people lost their lives. Nearly 2000 homes were destroyed. Property damage exceeded $100 million. The storm reshaped the coastline, pushing the

---

[39] *Id.* at 65.

[40] *Id.* at 63.

[41] Brown, C., *Hurricanes and Shoreline Changes in Rhode Island*, in Hurricane in Southern New England (Gordon, B. ed.) 14-28 (1976)

[42] *Id.*

large dunes at Weekapaug back fifty feet, eroding the cliffs at Watch Hill by thirty-five feet, and inundating the salt ponds and wetlands. The area around Winnapaug Pond, including the property now owned by Petitioner, was completely flooded out.

According to the U.S. Army Corps of Engineers, 71 hurricanes have struck Rhode Island's shore since 1635 with an average frequency of one every seven years.[43] Of course hurricanes do not stick to any schedule. After the disastrous 1938 hurricane, many of the coastal areas were rebuilt, additional "armoring" was installed, and then Hurricane Carol struck in 1954, killing 19 people, destroying 3800 houses, sweeping the barrier clean, and causing another $90 million in damage.[44]

Hurricanes are not the only threat to coastal development. Sea levels have been steadily rising as a result of thermal expansion of the oceans and the melting of glaciers and ice sheets in response to global warming.[45] Sea

---

[43] U.S. Army Corps of Engineers, *Hurricane Survey Interim Report, Narragansett Pier, Rhode Island*, GPO (1960)

[44] *The Providence Journal*, p. 1 (Sept. 8, 1954).

[45] Global average temperatures have increased by 1.1 degree F since 1900. During that same time period carbon dioxide emissions have increased by 30%. The decade of the 90's was the hottest one on record and 1997 was the hottest year ever recorded. Increased global temperatures are expected to increase the number and severity of extreme weather events such as floods, hurricanes and tornadoes. According to the 1995 Report of the IPCC, sea levels are expected to rise by 1 meter by 2100. IPCC, Working Group I, The Science of Climate Change (Second Assessment Report) (1995); A. Revkin, *Scientists Now Acknowledge Role of Humans in Climate Change, The New York*

level is rising more rapidly along the U.S. coast than worldwide.[46] Studies by EPA and others have estimated that along the Gulf and Atlantic coasts, a one foot rise in sea level is likely by 2050 and could occur as early as 2025. A sea level rise of one foot would increase the size of the 100-year floodplain in the U.S. from 19,500 square miles to 23,000 square miles, and increase flood damages by 36-58 percent.

Rising sea levels will continue to inundate wetlands and lowlands, accelerate coastal erosion, exacerbate coastal flooding, threaten coastal structures, raise water tables, and increase the salinity of rivers, bays and aquifers. For example, studies have shown that a one meter (3 foot) rise on the Atlantic coast would result in the erosion of from 50 to 100 meters from New England to Maryland. This would enable a 15-year storm to flood many areas that would otherwise only be flooded by a 100-year storm.[47] Nationwide, the total cost of damages from a sea level rise of one meter would be $270-475 billion, ignoring future development.[48]

Times, A-1 (October 26, 2000); R. Peters and T. Lovejoy, Global Warming and Biological Diversity, xii-xiv (1993)

[46] *See*, Hoffman, J.S., D. Keyes, and J.G. Titus, Projecting Future Sea Level Rise, U.S. Environmental Protection Agency (1995); Titus, J.G. and Vijay Narayanan, *The Probability of Sea Level Rise*, U.S. Environmental Protection Agency (1995).

[47] Kana, T.W., *et al.*, *The Physical Impact of Sea Level Rise in the Area of Charleston, South Carolina* in Barth and Titus, Greenhouse Effect and Sea Level Rise: A Challenge for This Generation (1984)

[48] Titus J.G., *et al.*, *Greenhouse Effect and Sea Level Rise: The Cost of Holding Back the Sea, Coastal Management* 19:171 (1991)

With potential costs of this magnitude, there will be tremendous social and political pressure to "armor-plate" the beach with levees and bulkheads, and to expand "beach nourishment" projects (i.e. importing replacement sand).[49] But the environmental costs of such engineering would be enormous. Bulkheading and filling along the inland perimeter of a marsh prevents inland migration of wetland vegetation as sea level rises.[50] This kind of structural approach would eliminate most of the nation's coastal wetlands. A more prudent approach would be to avoid, or if necessary to restrict, intensive development in high hazard areas such as the one involved here.

States like Rhode Island find themselves caught between opposing forces in dealing with these problems. On the one hand, Congress, in the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. § 1451, has stated a national policy to "encourage the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone." 16 U.S.C. § 1452(1). Such programs must provide for "the protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs and fish and wildlife and their habitat within the coastal zone," as well as "minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard and erosion-prone areas." 16 U.S.C. § 1452 (2). As mentioned, Rhode Island led the way by adopting

---

[49] *Id.*, at 209.

[50] *Id.*

a coastal zone management program one year before enactment of the CZMA.

In 1996, Congress amended the CZMA to add a special program to control "nonpoint" source pollution in the coastal zone. 16 U.S.C. § 1455b. This provision directs states to prepare and adopt "management measures" to control the addition of pollutants from new and existing sources – including septic systems – that reflect "the greatest degree of pollutant reduction achievable through the application of the best nonpoint pollution control practices," including siting criteria for new development. 16 U.S.C. § 1455b(g)(5). Failure to adopt such controls results in loss of financial assistance to implement the overall CZMA program. 16 U.S.C. § 1455b(c)(3).

Congress has further decreed that, to qualify for insurance coverage under the National Flood Insurance Program, states and local communities must adopt strict floodplain management requirements including performance standards for new construction and a prohibition on unnecessary and incompatible developments in special flood hazard areas as listed on the Flood Insurance Rate Maps required by the Flood Insurance Act. 42 U.S.C. § 4784.

On the other hand, when states like Rhode Island, which has been diligent and thorough in its approach to dealing with these difficult problems, take the steps called for under these national policies and programs, they are sometimes met, as here, with outraged owners of coastal property demanding the right to do the very things that sound coastal management says they should not do. The fact is that Petitioner's property is not an

island separate and apart from the rest of the coastal system. Land is not merely a commodity, to be bought and sold; it is also a community of living organisms, human and non-human, to be respected and properly cared for. What happens on Petitioner's land has tremendous spillover effects on other landowners and on the ecological system which supports everything that exists in the coast.

On the Flood Rate Maps the area in which Petitioner's property is located is labeled "V Zone" which stands for "high hazard zone." J.A 26. There is good reason for the label, and the State of Rhode Island had good cause to reject Petitioner's proposal to place still more lives and property at risk from the next storm to come sweeping up the coast.

CONCLUSION

For the foregoing reasons, amici urge the Court to uphold the judgment of the Supreme Court of Rhode Island.

Respectfully submitted,

PATRICK A. PARENTEAU*
VERMONT LAW SCHOOL
South Royalton, VT 05068
(802) 763-8303

*Counsel of Record
Attorney for Amici Curiae

APPENDIX A

BIOGRAPHIES OF AMICI

Dr. John M. Teal is a Scientist Emeritus at Woods Hole Oceanographic Institution where he was Chair of Biology. He is a recipient of the National Wetlands Award for Science Research from the Environmental Law Institute, U.S. Environmental Protection Agency, U.S. Fish & Wildlife Service, and National Marine Fisheries Service, and the 1999 Odum Award from The Estuarine Research Federation. The author of over 140 scientific publications, his 1969 book, *Life and Death of a Salt Marsh*, played a major role in increasing public awareness of the importance of wetlands. He is a past president of the Society of Wetland Scientists, and is also a member of Ecological Society of America, Estuarine Research Federation, Society for Ecological Restoration, American Association for the Advancement of Science, Ecological Engineering Society, and Society of Limnology and Oceanography

Dr. R. Scott Warren holds the Temple Chair in the Department of Botany at Connecticut College. He received his Ph.D. from the University of New Hampshire, and has worked in tidal wetlands for over 25 years, where his research has focused on salt and brackish marsh vegetation dynamics, impacts of sea-level rise, tidal wetland restoration, and effects of *Phragmites* invasion on angiosperm community structure, invertebrate populations and fish. He teaches courses in tidal marsh-estuarine ecology, and has appeared in numerous peer-reviewed publications and scientific meeting presentations. He is currently on the editorial board of the journal Estuaries and served in a similar capacity for the journal

Wetlands from 1992 – 1996. He has been president of the New England Estuarine Research Society, the Northeast Section of the American Society of Plant Physiologists, and a member of the Governing Board of the Estuarine Research Federation.

Dr. Francis Golet is Professor of Wetland Ecology in the Department of Natural Resources Science at the University of Rhode Island. Dr. Golet is co-author of the *Classification of Wetlands and Deepwater Habitats of the United States*, a publication that was adopted as a National Standard by the Federal Geographic Data Committee of the Office of Management and Budget in 1996. His principal areas of research expertise include: wetland classification, wetland wildlife habitat assessment, forested wetland ecology, ecology and conservation biology of wetland songbirds, wetland vegetation dynamics, and wetland restoration. In 1988 he received the Rhode Island Coastal Conservation Award from the Rhode Island Coastal Resources Management Council. For the last 9 years Dr. Golet has been Principal Investigator for one of the largest salt marsh restoration projects in New England, at Galilee, Rhode Island; in 1999 he and his research team received a Coastal America Partnership Award for their accomplishments in this successful project.

Dr. Jon C Boothroyd is a Professor of Geology at the University of Rhode Island and the Rhode Island State Geologist. He served as the National Chair of the Geological Society of America, Northeastern Section, Associate Editor of the *Journal of Sedimentary Research*, Panel member of the Quaternary Geology and Geomorphology Division of the Geological Society of America, and President of the Society for Sedimentary Geology. He is primarily a

field geologist specializing in coastal, braided river, and various glacial environments with 35 years of field experience in New England, South Carolina, Alaska, Iceland, Saudi Arabia, Madagascar, Ecuador and Mexico. He wrote the coastal hazards section of the Rhode Island Coastal Resources Management Plan, a special area management plan for the Salt Ponds of Rhode Island, and an atlas and habitat inventory/resource mapping for Narragansett Bay and associated coastlines.

Dr. Joy Zedler is the Aldo Leopold Professor of Restoration Ecology at the University of Wisconsin-Madison Arboretum and Botany Department, and is the Director of Research for the UW-Madison Arboretum. Dr. Zedler's research interests include restoration and wetland ecology, role of biodiversity in ecosystem function, use of mesocosms in wetland research, invasive plants, and adaptive management. She helps edit four peer-reviewed journals (*Ecological Applications, Wetlands Ecology and Management, Ecological Engineering,* and *Ecosystems).* She is a member of Ecological Society of America, Estuarine Research Federation, Society for Ecological Restoration, Society of Wetland Scientists. Dr. Zedler collaborates on research to improve the effectiveness of salt marsh restoration in southern California, and recently published *Handbook for Restoring Tidal Wetlands* (J. Zedler, ed. 2000. CRC Press).

Dr. Scott Nixon is Professor of Oceanography at the University of Rhode Island, and Director of the Rhode Island Sea Grant program. He is a recipient of the New England Estuarine Research Society award for outstanding contributions to estuarine research, the First "Wiese

Lecturer" in Marine Science from the University of Southern Alabama, and the B. H. Ketchum Award for excellence in coastal research from the Woods Hole Oceanographic Institution. He is Co-editor-in-Chief of the journal ESTUARIES, and a member of the National Research Council's Ocean Studies Board, and Committees on the Coastal Ocean, the Role of Terrestrial Ecosystems in Global Change, and the Restoration of the Greater Everglades Ecosystem (Vice Chair). He is also a member of the American Society of Limnology and Oceanography, American Society of Environmental History, and the Estuarine Research Federation, and the author of numerous publications on the coastal ecosystem including, *A Coastal Marine Ecosystem: Simulation and Analysis* (Ecological Studies, 1978), *Coastal marine eutrophication: A definition, social causes, and future concerns,* (Ophelia 1995)

Dr. Orrin Pilkey is the James B. Duke Professor emeritus of Earth and Ocean Science, and the Director of the Program for the Study of Developed Shorelines in the Nicholas School of the Environment at Duke University. Dr. Pilkey has written more than 200 publications on shoreline processes, erosion, barrier islands and coastal management issues including the Corps and the Shore (Island Press), and Living by the Rules of the Sea (Duke Press). He is a recipient for numerous awards including the Francis Shepard medal for excellence in marine geology, the American Association of Petroleum Geologist's George V. Cohee Public Service Award, the American Ecological Institute's Outstanding Public Communication Award, the Federal Emergency Management Agency's Outstanding Public Service Award, and the Geological Society of America's Public Service Award. He is the

former president of the Society of Sedimentary Geology, president of the North Carolina Academy of Science, member of the council of the Geological Society of America, and co-editor and author of the 22-volume Journal of Sedimentary Petrology.

JAN 3 2001

No. 99-2047

Supreme Court, U.S.
FILED
JAN 3 2001
CLERK

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF STATES OF CALIFORNIA, ALASKA, COLORADO, CONNECTICUT, GEORGIA, HAWAII, MAINE, MASSACHUSETTS, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, OHIO, OKLAHOMA, SOUTH DAKOTA, VERMONT AND WASHINGTON, THE DISTRICT OF COLUMBIA AND THE UNITED STATES VIRGIN ISLANDS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

BILL LOCKYER
Attorney General of the State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record
1515 Clay Street, Suite 2000
Oakland, California 94612-1413
Telephone: (510) 622-2139

Attorneys for State of California

[Additional Counsel Listed On Inside Cover]

BEST AVAILABLE COPY

BRUCE M. BOTELHO,
Attorney General of the
State of Alaska

KEN SALAZAR,
Attorney General of the
State of Colorado

RICHARD BLUMENTHAL,
Attorney General of the
State of Connecticut

THURBERT E. BAKER,
Attorney General of the
State of Georgia

EARL I. ANZAI,
Attorney General of the
State of Hawaii

ANDREW KETTERER,
Attorney General of the
State of Maine

THOMAS F. REILLY,
Attorney General of the
State of Massachusetts

MIKE MCGRATH,
Attorney General of the
State of Montana

FRANKIE SUE DEL PAPA,
Attorney General of the
State of Nevada

PHILLIP T. MCLAUGHLIN,
Attorney General of the
State of New Hampshire

JOHN J. FARMER, JR.,
Attorney General of the
State of New Jersey

ELIOT SPITZER,
Attorney General of the
State of New York

BETTY D. MONTGOMERY,
Attorney General of the
State of Ohio

W.A. DREW EDMONDSON,
Attorney General of the
State of Oklahoma

MARK W. BARNETT,
Attorney General of the
State of South Dakota

WILLIAM H. SORRELL,
Attorney General of the
State of Vermont

CHRISTINE O. GREGOIRE,
Attorney General of the
State of Washington

ROBERT R. RIGSBY,
Corporation Counsel
District of Columbia

IVER A. STRIDIRON,
Attorney General of the
United States
Virgin Islands

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT..... 5

ARGUMENT 7

I. THE WRIT SHOULD BE DISMISSED BECAUSE THE TRIAL COURT'S JUDGMENT WOULD NOT BE AFFECTED BY THE COURT'S RESOLUTION OF PALAZZOLO'S PETITION 7

II. A TAKING CLAIM IS NOT RIPE WHERE THE APPLICANT HAS NEITHER ESTABLISHED THE BOUNDARIES OF THE PROPERTY NOR APPLIED FOR THE PROJECT UPON WHICH HE BASES HIS CLAIM.... 8

A. Palazzolo Failed to Establish That He Owned the Property That He Alleged Was Taken..... 9

B. Palazzolo Failed to Submit a Meaningful Application 11

III. THE COURT SHOULD RETAIN THE RIPENESS DOCTRINE'S REAPPLICATION REQUIREMENT..... 14

IV. A LANDOWNER MUST DEMONSTRATE THAT A REGULATION HAS RENDERED PROPERTY "VALUELESS" IN ORDER TO ESTABLISH THAT THERE HAS BEEN A PER SE TAKING 16

V. THE RHODE ISLAND COURT PROPERLY FOUND THAT REASONABLE INVESTMENT-ACKED EXPECTATIONS AND BACKGROUND PRINCIPLES OF RHODE ISLAND LAW BARRED PALAZZOLO'S TAKING CLAIM 22

TABLE OF AUTHORITIES

Page

CASES:

Agripost, Inc. v. Miami-Dade County, 195 F.3d 1225 (11th Cir. 1999), *cert. denied*, 121 S.Ct. 51 (2000) 17

Alden v. Maine, 527 U.S. 706 (1999).....3, 5

Alegria v. Keeney, 687 A.2d 1249 (R.I. 1997)..... 17

Allen v. Allen, 19 R.I. 114, 32 A. 166 (R.I. 1895)..... 9

Andrus v. Allard, 444 U.S. 51 (1979) 21

Assembly of God Church v. Vallone, 89 R.I. 1, 150 A.2d 11 (R.I. 1959) 19

Avenal v. United States, 100 F.3d 933 (Fed. Cir. 1996)..... 24

Basile v. Town of Southhampton, 89 N.Y.2d 974, 678 N.E.2d 489, 655 N.Y.S.2d 877 (N.Y.App.), *cert. denied*, 522 U.S. 907 (1997)..... 26

Board of Supervisors of Prince William County v. Omni Homes, Inc., 253 Va. 59, 481 S.E.2d 460 (Va. 1997), *cert. denied*, 522 U.S. 813 (1997).....17, 23

Butner v. United States, 440 U.S. 48, 55 (1979)..... 3

Cavin v. United States, 956 F.2d 1131 (Fed.Cir. 1992) 10

CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal.App.3d 306, 118 Cal. Rptr. 315 (Cal.App. 1974)..... 27

Chioffi v. City of Winooski, 165 Vt. 37, 676 A.2d 786 (Vt. 1996) 18

City of Bakersfield v. Miller, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393 (Cal. 1966), *cert. denied*, 384 U.S. 988 (1966)..... 27

TABLE OF AUTHORITIES – Continued

Page

City of Riviera Beach v. Taylor, 659 So.2d 1174 (Fla.App. 1995)..... 12

City of Virginia Beach v. Bell, 255 Va. 395, 498 S.E.2d 414 (Va.), *cert. denied*, 525 U.S. 826 (1998) 24

Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust, 508 U.S. 602 (1993).....17, 23

County of St. Clair v. Lovingston, 90 U.S. 46 (1874) 11

Creppel v. United States, 41 F.3d 627 (Fed.Cir. 1994) 25

Del Monte Dunes, Ltd. v. City of Monterey, 95 F.3d 1422 (9th Cir. 1996), *aff'd on other grounds*, 526 U.S. 687 (1999) 18

District Intown Properties Ltd. v. District of Columbia, 198 F.3d 874 (D.C.Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000)..... 17

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) 3

Executive 100 v. Martin County, 922 F.2d 1536 (11th Cir.), *cert. denied*, 502 U.S. 810 (1991)..... 15

FIC Homes of Blackstone, Inc. v. Conservation Comm'n, 41 Mass.App.Ct., 681 N.E.2d 61 (Mass.App. 1997)..... 17

Gazza v. New York State Department of Environmental Conservation, 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (N.Y.App.), *cert. denied*, 522 U.S. 813 (1997) 25

Gerhard v. Bridge Commn'rs, 15 R.I. 334, 5 A. 199 (R.I. 1886)..... 21

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992)..... 11

TABLE OF AUTHORITIES – Continued

Page

Grand River Dam Authority v. Grand-Hydro, 335 U.S. 359 (1948) 19

Gregory v. Ashcroft, 501 U.S. 452 (1991) 3

Grundy Center v. Marion, 231 Iowa 425, 1 N.W.2d 677 (Iowa 1942) 27

Hay v. City of Hanover, 436 N.W.2d 800 (Minn.App. 1991) 15

Herb v. Pitcairn, 324 U.S. 117 (1945) 7, 8

Indianapolis v. Miller, 168 Ind. 285, 80 N.E. 626 (Ind. 1907) 27

Jackvony v. Powel, 67 R.I. 218, 21 A.2d 554 (R.I. 1941) 29

Jewett v. Deerhorn Enterprises, Inc., 281 Or. 469, 575 P.2d 164 (Or. 1978) 28

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 17, 19

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 3

Landgate v. California Coastal Comm'n, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998) 10, 16

Landmark Land Co. v. Buchanan, 874 F.2d 717 (10th Cir. 1989) 15

Lechuza Villas West v. California Coastal Comm'n, 60 Cal.App.4th 218, 70 Cal.Rptr.2d 399 (1997), *cert. denied*, 525 U.S. 868 (1998) 10

Long Beach Equities, Inc. v. County of Ventura, 231 Cal.App.3d 1016, 282 Cal.Rptr. 877 (Cal.App. 1991), *cert. denied*, 505 U.S. 1219 (1992) 15

TABLE OF AUTHORITIES – Continued

Page

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 9, 11, 15

McCuskey v. Canyon County Comm'rs, 128 Ida. 213, 912 P.2d 100 (Ida. 1996) 17

Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991) 9

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 24

Olson v. United States, 292 U.S. 246 (1934) 20, 23

Outdoor Graphics v. City of Burlington, 103 F.3d 690 (8th Cir. 1996) 26

Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir.), *cert. denied*, 482 U.S. 906 (1988) 15

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) 6, 18, 21, 22, 23, 24

People v. Donovan, 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1 (Cal. 1962) 20

People v. New York Edison Co., 144 N.Y.S. 707, 159 A.D. 786 (N.Y.App.Div. 1913) 27

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469 (1988) 9

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) ...4, 23

Smith v. Town of Wolfeboro, 136 N.H. 337, 615 A.2d 1252 (N.H. 1992) 10

TABLE OF AUTHORITIES – Continued

Page

Southern Pacific Transpr. Co. v. Los Angeles, 922 F.2d 498 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991) 12, 13

Southview Assoc., Ltd. v. Bongartz, 980 F.2d 84 (2d Cir. 1992), *cert. denied*, 507 U.S. 987 (1993) 15

Starr v. Commn'r, 226 Conn. 358, 627 A.2d 1296 (Conn. 1992) 27

State v. McKee, 73 Conn. 18, 46 A. 409 (Conn. 1900) 27

Stern v. Halligan, 158 F.3d 729 (3d Cir. 1998) 17

United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266 (1943) 21

United States v. 50 Acres of Land, 469 U.S. 24 (1984) 19

United States v. Dow, 357 U.S. 17 (1958) 10, 24

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1975) 15

Williams v. City of Central, 907 P.2d 701 (Colo.App. 1995) 23

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 9, 12, 14, 15

Wilson v. Loew's, Inc., 355 U.S. 597 (1958) 7

Wooten v. South Carolina Coastal Council, 333 S.C. 469, 510 S.E.2d 716 (S.C. 1999) 26

Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996) 17

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS:

U.S. Constitution
Fifth Amendment 19, 21

STATUTES:

Cal. Pub. Resources Code § 30010 13

R.I. Gen. Laws 46-6-1 (1956) 21

OTHER AUTHORITIES:

Appraisal Institute, "Real Estate Valuation in Litigation" (2d.Ed. 1995) 20

Interagency Land Acquisition Conference, "Uniform Appraisal Standards For Federal Land Acquisitions" (1992) 20

Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984) 28

INTERESTS OF AMICI CURIAE

This is not a case about ethereal concepts of property. It concerns a speculator who, without providing the regulatory agency the opportunity to review his actual development plan, seeks to have the taxpayers of Rhode Island compensate him because he has been frustrated in his pursuit of a use that, if permitted, would pollute the town's water supply. The expanded conception of the taking doctrine being posed here threatens not only the treasuries of the States, but their distinct interests in developing real property and land use rules that strike an appropriate balance between public needs and private rights. The Rhode Island Supreme Court's decision preserves those interests, and its decision should be affirmed.

Between 1959 and 1969 Anthony Palazzolo and his corporation acquired the property that is the subject of this taking claim for a total of $13,000, which Palazzolo concedes was the fair market value of the property at the time of acquisition. Decision, R.I. Sup.Ct. No. 88-0297, at 1-2; Trial Exh. E at 3. In the mid-1960's and early 1970's, Rhode Island rejected Palazzolo's applications to fill this intertidal salt marsh, and Palazzolo did not pursue a taking claim following the last denial. Having waived any taking claim based on the first round of administrative decisions, Palazzolo then made identical applications in the 1980's.

Palazzolo insisted during the 1985 administrative process that he wished to fill a portion of the property for a "beach facility," and his attorney even objected during the hearing to any consideration of residential use. *See*

pp. 11-12 *infra*. As Palazzolo later admitted, however, he always intended to use the fill for residential development. *See* pp. 11-12 n.3 *infra*. Palazzolo thus prevented the agency from defining the residential uses that it might have permitted had it known that Palazzolo wished to develop the entire parcel for this quite different purpose.

At trial, Palazzolo dispensed with the beach facility proposal and claimed that he was entitled to compensation for his lost opportunity to develop 74 residential units. The State produced evidence which showed that most of the fill proposed by Palazzolo would be deposited on State-owned tidelands below the mean high tide line. See p. 9 *infra*. At the conclusion of trial, the trial court rejected Palazzolo's taking claim, finding that his residential project would create a public nuisance and that, even with the permit denial, the property was worth $200,000 because the State would have approved limited residential use had he only applied. The Rhode Island Supreme Court affirmed.

Retaining as much value as it does, Palazzolo's property is still worth more than fifteen times what he paid for it. There has never been a regulatory taking in these circumstances. But Palazzolo contends that a taking nevertheless has occurred because he was entitled to a "reasonable return" of $3.1 million – *an amount more than 200 times the fair market value of his initial investment*. No one has ever strayed so far from the original meaning of the Fifth Amendment.

Given the implications of Palazzolo's extraordinary arguments, the States' concerns here are not surprising. Some of these concerns are practical. This case invites an

enormous expansion of the ripeness doctrine and even more takings litigation. If applicants are no longer required to apply for the uses on which they base their taking claims, it is not hyperbole to suggest that virtually every applicant challenging a permit denial will append a taking claim based on the loss of some use never considered by the agency.

The States also are concerned with the potential liability threatened by Palazzolo's extravagant construction of the taking doctrine. The Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) was clear: regulation categorically denies all economically viable use only when it renders property "valueless." Palazzolo's view that there has been a per se taking under *Lucas* unless government regulation allows a reasonable return to a speculative enterprise would threaten to deplete the States' resources by creating "new and unforeseen claims in vast amounts." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 542 (1998) (Kennedy, J., concurring in part and dissenting in part).

But this latest threatened expansion of the taking doctrine also touches important concerns of federalism. In much of its recent jurisprudence this Court has emphasized the benefits of decentralized government and acknowledged the sovereignty of the States. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The state interests implicated by this case – state real property law and state land use regulation – are matters of peculiar state concern. *See Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *Butner v. United States*, 440 U.S. 48, 55

(1979). State law always has been understood to define property interests, and accordingly, a landowner's expectations. *E.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984). But Palazzolo's view federalizes property law – rather than allow state law to define expectations, it assumes that there is a natural law of property with an inherent expectation of use to which the States must conform their rules of property.

These concerns are more than philosophical. It is sometimes easy to take for granted the extraordinary responsibility that State and local governments bear in regulating a society as large, complex and diverse as ours, a responsibility that is weighted with the obligation of conserving resources for future generations. When the federal judiciary is asked to create an artificial conception of "property" in which landowners are to be guaranteed a return on investment and a permit denial is presumed to conscript private property into public use, the balance of the system is threatened. Rather than engage in the sensitive accommodation of private and public interests demanded by modern land use regulation, agencies will begin to make decisions to avoid the exorbitant expense of defending taking claims and the threat of liability if they take any misstep along the way.

In the end, the Palazzolo view reflects a not-so-subtle shift from the narrow restraints of *Lucas* to a regime in which property is redefined in a way that "singles out" the public interest to bear the risks of unfounded private expectations. This level of intrusion into state property law and land use decisionmaking is unjustified. After all, the regulatory system is the product of a political process

in which landowners are well-represented, and this political process already provides a powerful restraint against excessive regulation. Moreover, the Court has informed state courts and legislators of the need for vigilance in these matters, and this Court has been "unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States." *Alden*, 527 U.S. at 755.

There is no constitutional imperative to justify Palazzolo's proposed redefinition of state property rules and recalibration of the delicate land use process. The decision reached here by the Rhode Island Supreme Court was the end product of its evaluation of several factors: state real property law, the expectations created by over a century of land use restrictions on fill activities, the enormous harms threatened by the proposed project, and the equitable considerations presented by an applicant who refuses to say what he is doing and expects the public to pay for his speculative lost profits. The Court should not overrule the Rhode Island court's evaluation, much less relax the ripeness doctrine and expose public agencies to liability for every permit denial that frustrates a landowner's profit expectations.

The judgment below should be affirmed.

SUMMARY OF ARGUMENT

1. The trial court's judgment was based on the independent ground that Palazzolo did not have a property right to engage in the proposed use because the filling of these particular wetlands would constitute a public

nuisance under Rhode Island common law. Because the Court's resolution of the questions presented will not alter the trial court's judgment, the writ should be dismissed as improvidently granted.

2. Palazzolo failed to meet even minimal ripeness standards because he neither established that he owned the property alleged to be taken nor did he apply for the project upon which he bases his claim. Adherence to the "reapplication requirement" remains necessary to insure that an agency's denial of a particular project is not improperly construed as the denial of all use.

3. Whether an agency's action deprives property of all economically viable use under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) should be judged on whether the agency's action has rendered the property "valueless." In determining the impact of a regulation's impact on the value of property, an analysis of the property's fair market value before the alleged taking must include all those restrictions on development that a reasonable buyer would have considered.

4. Based on its assessment of Palazzolo's reasonable investment-backed expectations, the Rhode Island Court properly rejected Palazzolo's taking claim under the ad hoc inquiry in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 123-125 (1978). Further, it makes little difference when Palazzolo acquired the property, because landowners in Rhode Island acquire property subject to the right of the Legislature to declare public nuisances such as the filling of these wetlands.

ARGUMENT

I. THE WRIT SHOULD BE DISMISSED BECAUSE THE TRIAL COURT'S JUDGMENT WOULD NOT BE AFFECTED BY THE COURT'S RESOLUTION OF PALAZZOLO'S PETITION.

If a judgment below rests on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted. *E.g., Wilson v. Loew's, Inc.*, 355 U.S. 597 (1958). The Court exercises its power "to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review would amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945). This case calls for the application of this principle.

As the trial court found, Palazzolo's proposed filling of 18 acres of salt marsh would have significant offsite impacts. The proposed project would reduce existing salt marsh in adjacent Winnapaug Pond, harm fish populations, and increase nitrate levels in the groundwater that is the town's sole source of drinking water. These serious project impacts would constitute a public nuisance under Rhode Island common law. The trial court thus concluded that the State's nuisance law prohibited Palazzolo's taking claim. Decision, R.I. Sup.Ct. No. 88-0297, at 10-11; see JA at 80-93 (testimony of Reis).

This conclusion would not be affected by the Court's resolution of the questions presented in Palazzolo's petition for a writ of certiorari. None of the questions presented to this Court challenge the directive in *Lucas* that a

state's common law of public nuisance serves as a background principle of real property law that limits the permissible uses of property. Assuming arguendo that this Court resolved all of the questions presented in Palazzolo's favor, the trial court on remand would need to revise its written opinion, but its judgment would be unaffected because its public nuisance determination would continue to function as a complete defense to the taking claim. This is not speculation. The trial court already has said as much, finding that "even were this Court to determine that the CRMC's denial of the plaintiff's application was a 'total taking' under *Lucas*, the nuisance doctrine would prevent this Court from awarding the plaintiff compensation." Decision at 11.

Because the same judgment would be rendered by the state court after the Court corrected its views of federal law, this Court's present review would amount to nothing more than an advisory opinion. *See Herb*, 324 U.S. at 125-126. The writ therefore should be dismissed as improvidently granted.

II. A TAKING CLAIM IS NOT RIPE WHERE THE APPLICANT HAS NEITHER ESTABLISHED THE BOUNDARIES OF THE PROPERTY NOR APPLIED FOR THE PROJECT UPON WHICH HE BASES HIS CLAIM.

Under the "ripeness" doctrine, a claim that government regulation effects a taking of property must be dismissed unless the government entity charged with implementing the regulation has reached a "final and authoritative" decision regarding the application of the

regulation to the property at issue. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 348 (1986); *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 190 n.11, 199-200 (1985). The Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates*, 477 U.S. at 351. Although much of the attention has focused on Palazzolo's failure to resubmit less ambitious development plans, Palazzolo's taking claim was unripe for other reasons.[1]

A. Palazzolo Failed to Establish That He Owned the Property That He Alleged Was Taken.

During the administrative process and at trial, Rhode Island demonstrated that most of the lands that Palazzolo proposed to fill were below the mean high tide line, see, e.g., Joint Appendix (JA) at 27 (CRMC decision), at 60-62 (testimony of Fugate), at 90 (stipulation of Palazzolo's attorney); Trial Exhs. T, U, V, AA (showing tidal elevations), and therefore were public trust lands belonging to Rhode Island. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988); *Allen v. Allen*, 19 R.I. 114, 32 A. 166 (R.I. 1895). Finding the taking claim deficient on so many other grounds, the lower courts never reached the ownership issue, even though Rhode Island pressed it throughout the lower court proceedings. Br. of Appellees,

---

[1] Because it is jurisdictional, a ripeness argument may be raised at any time. *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 265 n.13 (1991).

Palazzolo v. Rhode Island, R.I. Supr. Ct. No. 98-333A at 34. Palazzolo's taking claim is not ripe until this most basic of ripeness issues – who owns what – is decided.

A taking claim cannot be predicated on the deprivation of property unless the plaintiff can demonstrate "undisputed ownership" of the property at the time of the alleged taking. *Cavin v. United States*, 956 F.2d 1131, 1134 (Fed.Cir. 1992); *see United States v. Dow*, 357 U.S. 17, 20-21 (1958). It follows that an agency cannot make a final decision on the scope, type, intensity and location of approvable development if it does not know the boundaries of the property on which the development is to be located. Likewise, it would be premature for a court to adjudicate "how far" a regulation goes in its impact on property without this information; as just one example, a court could not begin to determine the economic impact of a permit denial on the value of property without knowing whether the affected property consisted of five, ten or 20 acres.

The state courts have addressed this issue, and have found that a taking claim is not ripe until the landowner establishes the boundaries of the property that he proposes to develop and upon which he bases his taking claim. *Lechuza Villas West v. California Coastal Comm'n*, 60 Cal.App.4th 218, 70 Cal.Rptr.2d 399, 410-11 (1997), *cert. denied*, 525 U.S. 868 (1998) (dismissing taking claim as unripe where applicant had not established seaward tidelands boundary of property); *see Landgate v. California Coastal Comm'n*, 17 Cal.4th 1006, 73 Cal.Rptr.2d 841, 953 P.2d 1188 (Cal.), *cert. denied*, 525 U.S. 876 (1998) (no final decision until court first determined lot lines of property proposed for development); *Smith v. Town of Wolfeboro*,

136 N.H. 337, 615 A.2d 1252 (N.H. 1992) (no taking where issue of lot legality had not been resolved).

The Court therefore should dismiss the taking claim as unripe until the Rhode Island courts first decide whether the State or Palazzolo owns the property alleged to have been taken.[2]

B. Palazzolo Failed to Submit a Meaningful Application.

The ripeness doctrine also requires that a claimant submit a "meaningful application." *MacDonald, Sommer & Frates*, 477 U.S. at 353 n.8; *see, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 63 n.15 (1st Cir. 1991), *cert. denied*, 502 U.S. 866 (1992). As the Rhode Island court found, Palazzolo never applied for the residential uses upon which he now bases his taking claim. *Palazzolo*, 746 A.2d at 714. Indeed, Palazzolo in both 1983 and 1985 failed to disclose his actual reasons for seeking to fill the salt marsh.[3] His failure to apply for the project upon which he

---

[2] Palazzolo may contend that he had record title to these lands and that Rhode Island did not acquire them through the process of erosion. That argument would be erroneous because riparian owners are subject to the gain and loss of title through the processes of accretion and erosion. *E.g., County of St. Clair v. Lovingston*, 90 U.S. 46 (1874). Moreover, any such argument only would underscore the need for resolution of the title issue before adjudicating the taking claim.

[3] At the August 18, 1983 administrative hearing, Palazzolo testified under oath as follows:

Q: Do you propose to build on this property?

A: Not necessarily. . . .

bases his taking claim makes it unripe. *Williamson Planning Comm'n*, 473 U.S. at 189-90; *see Southern Pacific Transpr. Co. v. Los Angeles*, 922 F.2d 498, 503-04 (9th Cir. 1990), *cert. denied*, 502 U.S. 943 (1991); *City of Riviera Beach v. Taylor*, 659 So.2d 1174, 1180-81 (Fla.App. 1995).

Palazzolo says that none of this matters because Rhode Island (in his estimation) would have denied any project that he submitted. The ripeness doctrine, however, is not satisfied by having the landowner make assumptions about the final decision that an agency might have reached if the proper application had been made. Public agencies seek to avoid making decisions that result in the taking of property, and they need to understand the consequences that their actions might

---

Q: Do you know whether or not it would pass a perk test?

A: It is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that. Trial Exh. DD (transcript of 1983 hearing), pp. 20, 22; see Trial Exh. I (1983 application of Palazzolo to CRMC, describing proposed use of fill); Trial Exh. DD (transcript of 1985 hearing, testimony of Palazzolo witness Grant) at 45; Trial Exh. I (1985 application of Palazzolo, stating "[t]here will be NO structures on the property and no individual disposal systems") (emphasis in original).

At trial in 1997, Palazzolo told a much different story:

Q: Now, when you applied in 1983 to CRMC, what did you make application for?

A: I made application to build houses, the house lots, fill. I wanted to fill.

Q: And was that your intent at the time, was to do residential development?

A: Yes, it was. Trial Testimony, Vol. 1, at 65.

have on a landowner's actual intended use of property. Moreover, many agencies have statutory (or implied) authority to permit uses that might otherwise conflict with the agency's policies if such an approval is necessary to avoid a taking. *See, e.g.*, Cal. Pub. Resources Code, § 30010; *Southern Pacific Transpr. Co*, 922 F.2d at 503 n.5. Agencies cannot exercise this authority, however, if project proponents do not say what they really want.

Had Palazzolo applied for a residential use, he would have been required to undertake an environmental review and obtain approvals for septic systems that would have enabled the regulatory agency to determine the costs and impacts of the proposed use and the consequences of a permit denial. JA at 50-57 (testimony of Chateauneuf); at 63-67 (testimony of Fugate). Once this application was complete, the agency could have considered the possibility of an alternative residential project on the upland portions of the site. See JA at 70. Palazzolo's application for a beach facility, however, gave the agency no reason to consider residential use. JA at 63-65. Indeed, at the 1985 hearing, Palazzolo's attorney successfully *objected* to questions about possible residential uses. Trial Exh. DD (transcript of 1985 hearing) at 67.

In addition, Palazzolo's taking claim is based on the denial of use of the entire parcel but his beach facility application proposed to fill only about 11.4 acres. Trial Exh. I (Palazzolo's profile of proposed fill). It cannot be assumed that, because an agency denies use on one portion of a parcel, it necessarily would have denied use of the entire parcel. Here, the 11.4 acres that Palazzolo proposed to fill were exclusively wetlands and excluded the

upland portions of the property. Trial Exh. I (1985 application of Palazzolo) at 2 ("[t]here will be no filling of the existing high areas"). Had Palazzolo applied to develop the entire parcel for a residential use, the record suggests that the Rhode Island agency might have approved up to four houses on upland portions of the property that had been excluded from the 1985 application. Trial Testimony, Vol. 1, at 209-211 (testimony of Fugate). Although Rhode Island finally had a chance to present evidence regarding the possibility of residential use *at trial*, the ripeness doctrine demands that this opportunity be provided *during the administrative process* where the agency is in a position to properly review and approve an alternative development that might avoid a taking claim. *E.g., Williamson Planning Comm'n.*

Palazzolo's taking claim is not ripe because he never submitted a meaningful application for the residential use that now forms the basis of his taking claim.

III. THE COURT SHOULD RETAIN THE RIPENESS DOCTRINE'S REAPPLICATION REQUIREMENT.

Because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews," the ripeness doctrine has required that applicants refine their projects and submit additional applications to demonstrate that there has been a definitive action by the agency indicating with some specificity what level of

development will be permitted. *MacDonald, Sommer & Frates,* 477 U.S. at 351, 353.[4]

The reapplication requirement performs an indispensable function: it insures that the denial of a particular project will not be equated as the denial of all use of the property. This promotes the rule that takings only occur in the "extreme circumstances" where a permit is denied *and* the effect of the denial is to prevent "economically viable" use of the property. *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 126, 127 (1975).

In fact, most permit denials are not final and authoritative decisions about the use to which property can be put. Agencies may be required to deny projects where projects fail to comply with informational requirements, ignore zoning restrictions, or conflict with resource protection policies. Even sophisticated, well-conceived projects may necessitate denials until they can be adjusted to meet reasonable land use and environmental concerns. Yet, once the developer has addressed the outstanding issues and the agency is in a position to make a final use

---

[4] Following the lead of *Williamson* and *MacDonald,* the lower courts repeatedly have dismissed claims as unripe where applicants failed to modify their projects in any meaningful way following initial rejection of their plans. *See, e.g., Southview Assoc., Ltd. v. Bongartz,* 980 F.2d 84, 95-98 (2d Cir. 1992), *cert. denied,* 507 U.S. 987 (1993); *Executive 100 v. Martin County,* 922 F.2d 1536, 1541 (11th Cir.), *cert. denied,* 502 U.S. 810 (1991); *Landmark Land Co. v. Buchanan,* 874 F.2d 717, 721 (10th Cir. 1989); *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1029 (3d Cir.), *cert. denied,* 482 U.S. 906 (1988); *Long Beach Equities, Inc, v. County of Ventura,* 231 Cal.App.3d 1016, 282 Cal.Rptr. 877, 886 (Cal.App. 1991), *cert. denied,* 505 U.S. 1219 (1992); *Hay v. City of Hanover,* 436 N.W.2d 800, 804-05 (Minn.App. 1991).

determination, development is usually approved. Thus, by demanding that applicants stick with the process, the reapplication requirement avoids taking claims and helps insure that an interim permit denial is not wrongly assumed to be a denial of all use.

Compliance with the reapplication requirement may prove frustrating at times, but the requirement nevertheless encourages compromise by all parties at the administrative level and deters unproductive litigation. And, while there may be occasional lapses, agencies have little incentive to abuse the reapplication requirement. Where agencies deny applications for reasons that, from an objective standpoint, are pretextual and in bad faith, that conduct by itself may be a constitutional violation. *See Landgate*, 953 P.2d at 1199, 1203. Short of that, the applicant should retain the burden of demonstrating that the agency has made a final and authoritative decision.

Palazzolo's claim that he was denied all use of the property, rejected as a factual matter by the State courts, is unripe under any conception of the ripeness doctrine.

IV. A LANDOWNER MUST DEMONSTRATE THAT A REGULATION HAS RENDERED PROPERTY "VALUELESS" IN ORDER TO ESTABLISH THAT THERE HAS BEEN A PER SE TAKING.

Palazzolo contends that he may establish a categorical (or "per se") regulatory taking even if the property retains significant value following the agency's decision. Palazzolo's view represents an unwarranted departure from *Lucas* and numerous cases following it, and the Court should reject it.

In order to establish a per se regulatory taking, the claimant must establish that there has been a final determination that both prohibits all use *and* that destroys the property's value. This follows from *Lucas*, where the Court accepted that there had been a per se taking because the South Carolina statute flatly prohibited all use and left the property "valueless." *Lucas*, 505 U.S. at 1015-19 & n.8. Acknowledging the stringency of this approach, the Court recognized that per se takings would be "relatively rare" and "extraordinary." *Id.* at 1016, 1017.

Throughout its taking jurisprudence, the Court has analyzed a taking claim on the basis of the regulation's impact on the value of the affected property. *E.g., Concrete Pipe and Prods., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 645 (1993); *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 497 (1987). With rare exception, the lower courts applying *Lucas* have required that a person claiming a per se regulatory taking demonstrate that the government action effectively destroyed the value of the property. *See, e.g., District Intown Properties Ltd. v. District of Columbia*, 198 F.3d 874, 882 (D.C.Cir. 1999), *cert. denied*, 121 S.Ct. 34 (2000); *Agripost, Inc. v. Miami-Dade County*, 195 F.3d 1225, 1231 (11th Cir. 1999), *cert. denied*, 121 S.Ct. 51 (2000).[5] Implicitly recognizing

---

[5] Other cases include *Stern v. Halligan*, 158 F.3d 729, 734-35 n.7 (3d Cir. 1998); *FIC Homes of Blackstone, Inc. v. Conservation Comm'n*, 41 Mass.App.Ct. 681, 673 N.E.2d 61, 67 (Mass.App. 1997); *Board of Supervisors of Prince William County v. Omni Homes, Inc.*, 253 Va. 59, 481 S.E.2d 460, 464 (Va. 1997), *cert. denied*, 522 U.S. 813 (1997); *Alegria v. Keeney*, 687 A.2d 1249, 1253 (R.I. 1997); *McCuskey v. Canyon County Comm'rs*, 128 Ida. 213, 912 P.2d 100, 103 n.2 (Ida. 1996); *Zeman v. City of Minneapolis*, 552

that he cannot challenge the Rhode Island's factual finding that the property is still worth $200,000, Palazzolo poses a number of approaches to avoid it. These raise a number of problems.

Initially, Palazzolo's contention that he lost 93.7% of the value of the property based on his "allegation" that his property was worth $3.1 million is erroneous. Pet. Br. at 38-40. Palazzolo forgets that a trial was held on this issue, and the Rhode Island court rejected Palazzolo's claim that the property was worth $3.1 million as "speculative." *Palazzolo*, 746 A.2d at 715 & n.7. Palazzolo's entire claim of deprivation is therefore premised on an allegation that was rejected as factually untrue by the lower courts.[6]

In addition, Palazzolo's allegation that the property is worth $3.1 million is based on a serious misconception of how the value of property should be computed when quantifying the impact of regulation, whether under the per se test in *Lucas* or the ad hoc inquiry in *Penn Central*. Palazzolo's computation of the value of the property before the alleged taking improperly assumed that he

---

N.W.2d 548, 553 n.4 (Minn. 1996); *Chioffi v. City of Winooski*, 165 Vt. 37, 676 A.2d 786, 790 (Vt. 1996). One exception is *Del Monte Dunes, Ltd. v. City of Monterey*, 95 F.3d 1422, 1433 (9th Cir. 1996), *aff'd on other grounds*, 526 U.S. 687 (1999). The Court did not address this aspect of the Ninth Circuit's decision. *Del Monte Dunes, Ltd.*, 526 U.S. at 704.

[6] At trial, Rhode Island demonstrated that, because of substantial infrastructure costs ignored by Palazzolo's appraiser, the entire parcel was worth only $55,000 even if fully developed as a residential project. JA at 101, 104 (testimony of Andolfo); see Joint Lodging No. 1, Items 9 and 10.

would have been entitled to develop all 74 units without any significant development restrictions. *Palazzolo*, 746 A.2d at 715 & n.7. Palazzolo's misconception of how value is determined is not unusual and merits consideration by the Court.

In determining compensation claims under the Fifth Amendment, the Court typically has measured deprivation by the regulation's impact on a property's fair market value. *See Keystone Bituminous Coal Assn.*, 480 U.S. at 497 (taking determined by considering a property's value before and after taking); *United States v. 50 Acres of Land*, 469 U.S. 24, 25-26 (1984). Fair market value is typically defined as:

> the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied. *Assembly of God Church v. Vallone*, 89 R.I. 1, 150 A.2d 11, (R.I. 1959), citing 4 Nichols, Eminent Domain (3d ed.), § 12.2 [1], p. 32; *see, e.g., Grand River Dam Authority v. Grand-Hydro*, 335 U.S. 359, 367-368 (1948) (applying Oklahoma law).

The Court long ago rejected the idea that fair market value is determined by the landowner's idealized view of the uses to which property might theoretically be put. In determining fair market value between willing buyers and sellers:

> [T]here should be taken into account all considerations that fairly might be brought forward and reasonably be given substantial weight in such bargaining . . . Elements affecting value

> that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration . . . *Olson v. United States*, 292 U.S. 246, 257 (1934).

The state courts look at this the same way. *See People v. Donovan*, 57 Cal.2d 346, 19 Cal.Rptr. 473, 369 P.2d 1, 8 (Cal. 1962) ("the trier of fact is entitled to and should consider those facts which a buyer would take into consideration in arriving at a fair market value," including zoning restrictions); *see also Appraisal Institute*, "Real Estate Valuation in Litigation" (2d.Ed. 1995), at 135 (potential purchasers in market place consider added risk of permit denial in determining price that they are willing to pay); *Interagency Land Acquisition Conference*, "Uniform Appraisal Standards For Federal Land Acquisitions" (1992), at A-23, found at http://www.usdoj.gov/enrd/land-ack/.

Therefore, the value of property "before" an alleged taking must take into account the existing restrictions on use of the property and all other pertinent matters on development potential that a buyer would consider. *See Olson*, 292 U.S. at 257. In determining the fair market value of the Palazzolo property in 1978, for example, it must be assumed that a reasonable buyer would take into account, *inter alia*, zoning, septic requirements, infrastructure costs, public trust claims, existing state and federal wetlands regulations, and the State's previous denial of development applications in the 1960's. Although a reasonable buyer in this situation would not assume that the agency would unlawfully "take" the property, she would

assume that the permit process for intensive residential use would be difficult and that, because of these various problems, it would be speculative how much development the agency might actually approve. Consequently, when the agency denied the permit in 1985 – the time of the action giving rise to the alleged taking – there would be little diminution in value because the market had already accounted for the possibility of that permit decision.[7]

The Court also should reject Palazzolo's claim that government regulation causes a per se taking unless the landowner receives a "reasonable return" on his investment. Pet. Br. at 42, 44. There is no authority and no constitutional policy that requires that the regulatory taking doctrine guarantee a profitable investment. The futility of Palazzolo's position is underscored by the Court's repeated admonitions that regulation legitimately may cause a substantial diminution in value and that the Fifth Amendment does not guarantee a profitable return. *Andrus v. Allard*, 444 U.S. 51, 66 (1979); *Penn Central*, 438 U.S. at 131; *see United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 285 (1943).

---

[7] Considering Palazzolo's original purchase price and that Rhode Island law has imposed restrictions on the filling of tidelands and wetlands since before 1960, *see Gerhard v. Bridge Comm'rs*, 15 R.I. 334, 5 A. 199 (R.I. 1886); R.I. Gen. Laws 46-6-1 (1956), it is doubtful that this property ever had much more than speculative value.

Under any value standard, the evidence in this case demonstrated that Palazzolo failed to establish that there had been a per se taking of the property.[8]

V. THE RHODE ISLAND COURT PROPERLY FOUND THAT REASONABLE INVESTMENT-BACKED EXPECTATIONS AND BACKGROUND PRINCIPLES OF RHODE ISLAND LAW BARRED PALAZZOLO'S TAKING CLAIM.

The Rhode Island Court took existing regulation into account in two ways when evaluating Palazzolo's taking claim: it found that when Palazzolo became the owner of the property in 1978, the right to fill wetlands was not part of the title that he acquired, *id.* at 716, and that, under the *Penn Central* test, Palazzolo lacked reasonable, investment-backed expectations that he could fill the property for a 74-unit subdivision, *id.* at 717. Palazzolo contends, however, that a court evaluating a taking claim should ignore the regulations in existence when the landowner acquired the property. Palazzolo's approach should be rejected.

The idea that there is no taking when a landowner knowingly purchases property subject to developmental

[8] Because at trial Palazzolo failed to establish any diminution in value resulting from the permit denial, *see* pp. 1-2, 15-16 *supra*, he likewise failed to establish a taking even under the *Penn Central* formulation of the takings doctrine. It bears emphasis that diminution in value should be measured by the regulation's impact on the entire parcel (such as the 20 acres in this case), not some partial segment.

restrictions is the flipside to the taking doctrine's proscription against singling out landowners to bear societal burdens – landowners, not society at large, must bear the consequences of their own actions. "The public may not by any means confiscate the benefits, or be required to bear the burden, of the owner's bargain." *Olson*, 294 U.S. at 255. Although courts have not always agreed on the doctrinal category in which to place it, they have found that pre-existing regulations may bar a taking claim for a variety of reasons.

Reasonable, Investment-Backed Expectations. Existing regulations always have played a role in defining a landowner's reasonable investment-backed expectations in the three-part ad hoc inquiry of *Penn Central*, 438 U.S. at 124. The Court has applied this concept a number of times since, and has found that expectations are decisive particularly where the property interest involves a well-regulated enterprise and the landowner purchased the property with actual notice of the challenged regulation. *Ruckelshaus*, 467 U.S. at 1005, 1008-09; *Concrete Pipe and Prods., Inc.*, 508 U.S. at 646. The lower courts likewise have found a landowner's lack of reasonable expectations to be dispositive in the *Penn Central* inquiry. *See, e.g., District Intown Properties Ltd.*, 198 F.3d at 884; *Williams v. City of Central*, 907 P.2d 701, 707 (Colo.App. 1995); *Omni Homes, Inc.*, 481 S.E.2d at 465-66.

Here, if Palazzolo's representations and applications in the 1980's are taken at face value, he did not even intend to engage in residential development when he became the record owner of the property in 1978. *See* pp. 11-12 n.3, *supra*. Moreover, a reasonable buyer would have known or should have known in 1978 (and most

likely in 1959) that there was little chance that he would obtain approval to fill wetlands for 74 residential units, in light of existing state and federal wetlands restrictions, public trust limitations and septic requirements. E.g., JA at 63-67 (testimony of Fugate); *see* p. 21 n.7, *supra*. The original purchase price reflected these uncertainties. In these circumstances, the Rhode Island court's straightforward application of the expectations principle disposes of Palazzolo's taking claim under *Penn Central*.

The Notice Defense. Numerous courts have found that taking claims are barred where a landowner had actual notice or assumed the risk that property would be subject to the regulation upon which the taking claim was based. *See, e. g., Avenal v. United States*, 100 F.3d 933, 937-38 (Fed. Cir. 1996); *City of Virginia Beach v. Bell*, 255 Va. 395, 498 S.E.2d 414, 417-19 (Va.), *cert. denied*, 525 U.S. 826 (1998); *Alegria*, 687 A.2d at 1254-55. This approach presents the fairness issue in its most basic form: if a landowner knew or should have known that his uses of the property would be restricted when he voluntarily acquired it, the public should not subsidize the risk that he undertook. *See Dow*, 357 U.S. at 27 (not inequitable to deny recovery where purchaser acquired property with "full notice" of condemnation proceedings). A reasonable buyer in 1978 would have known that the Rhode Island agency would not have approved the residential project upon which Palazzolo predicates his taking claim.[9]

---

[9] Palazzolo's reliance on *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 833 n.2 (1987), is misplaced. *Nollan* involved an excessive exaction, which is the physical taking of an already defined property interest (the right to exclude others). In a regulatory taking case, the property interest at stake (a landowner's right to engage in a particular developmental use) is not static and is subject to constant redefinition (e.g., a change in zoning where no rights have vested). This type of property interest cannot be defined until the landowner is denied a use and a court determines the owner's entitlement to engage in the use, measured in part by the landowner's expectations at the time of acquisition.

Expectations and Value. Reasonable investment-backed expectations inhere in the value of the property itself. *See Lucas*, 505 U.S. at 1034 (Kennedy, J., concurring); *Creppel v. United States*, 41 F.3d 627, 632 (Fed.Cir. 1994). In this sense, preexisting regulations do not act as a defense to a taking claim, but are factored into the value of property because the value of the property at the time of acquisition will reflect the existing regulatory climate. *See* pp. 8-21 *supra*.[10]

Pre-existing Regulations and Background Principles. Numerous courts since *Lucas* have found, as did the Rhode Island court, that regulations which exist at the

---

[10] The facts in *Gazza v. New York State Department of Environmental Conservation*, 89 N.Y.2d 603, 679 N.E.2d 1035, 657 N.Y.S.2d 555 (N.Y.App.), *cert. denied*, 522 U.S. 813 (1997) illustrate this. Gazza paid $100,000 for a parcel of property, 65% of which was subject to wetlands restrictions at the time of purchase; this represented a substantial discount over the $360,000 that Gazza claimed that the property would have been worth without restrictions. *Id.* at 1036. The trial court found that, following the denial of the variance, the property was still worth $80,000, which meant that denial caused only a 20% diminution in the "before" value of the property. Thus, while the *Gazza* court properly found for other reasons that there was no taking, such a modest diminution in value would not independently result in a regulatory taking.

time of acquisition are part of the landowner's title and therefore form part of the background principles that define the landowner's ability to use property. *See, e.g., Outdoor Graphics v. City of Burlington*, 103 F.3d 690, 694 (8th Cir. 1996); *Wooten v. South Carolina Coastal Council*, 333 S.C. 469, 510 S.E.2d 716, 717-718 (S.C. 1999); *Basile v. Town of Southhampton*, 89 N.Y.2d 974, 678 N.E.2d 489, 491, 655 N.Y.S.2d 877 (N.Y.App.), *cert. denied*, 522 U.S. 907 (1997).

Palazzolo contends, however, that the Court in *Lucas* did not intend to include pre-existing regulations as part of the antecedent inquiry into a claimant's property interests. Despite the attention that Palazzolo gives this issue, it has little application in practice because, as a defense to a per se taking claim under *Lucas*, it comes into play only in those rare circumstances where an applicant has met the narrow test for establishing a denial of all economically viable use. Indeed, the Court need not reach this issue if it finds that there was no per se taking or resolves the taking claim against Palazzolo on some other ground.

Here, the Rhode Island Supreme Court properly found that existing regulations formed part of the background principles defining Palazzolo's property, and Rhode Island and other amici curiae have demonstrated the correctness of that holding. The States support those arguments, and offer this additional consideration.

The background principles issue has been framed in a way that focuses on the change in ownership – that is, whether the wetlands regulations that were adopted after Palazzolo's corporation acquired the property but before

Palazzolo himself acquired it form "background principles" of Palazzolo's ownership but not that of his corporation. But the change in ownership makes little difference in this case. The wetlands regulations challenged by Palazzolo formed background principles defining his property interest because, no matter when he acquired the property, Palazzolo's property interest is held subject to the Legislature's authority to declare public nuisances such as destruction of wetlands.

Legislatures have the inherent authority to declare acts injurious to the public to be a public nuisance, even if the acts were not nuisances at common law. *See City of Bakersfield v. Miller*, 64 Cal.2d 93, 48 Cal.Rptr. 889, 410 P.2d 393, 397 (Cal. 1966), *cert. denied*, 384 U.S. 988 (1966); *Starr v. Commn'r*, 226 Conn. 358, 627 A.2d 1296 (Conn. 1992); *Grundy Center v. Marion*, 231 Iowa 425, 1 N.W.2d 677 (Iowa 1942); *People v. New York Edison Co.*, 144 N.Y.S. 707, 159 A.D. 786, 789 (N.Y.App.Div. 1913). Legislatures may exercise this authority subject to a state court determination whether the legislature's declaration was unfounded or arbitrary. *Indianapolis v. Miller*, 168 Ind. 285, 80 N.E. 626, 627 (Ind. 1907); *State v. McKee*, 73 Conn. 18, 46 A. 409, 412 (Conn. 1900). As one court observed – before *Lucas* was decided – contemporary environmental legislation "represents an exercise by government of this traditional power to regulate activities in the nature of nuisances." *CEEED v. California Coastal Zone Conservation Comm'n*, 43 Cal.App.3d 306, 118 Cal. Rptr. 315, 324 (Cal.App. 1974); *see Lucas*, 505 U.S. at 1035 (recognizing "unique concerns" presented by development of "fragile" coastal land system and suggesting that expectations

regarding their regulation is not necessarily confined to traditional nuisance law) (Kennedy, J., concurring).

Background principles restricting harmful uses of property are not limited to only those uses prohibited by the common law public nuisance doctrine as it existed at the time of a particular State's admission. *Lucas*, 505 U.S. at 1030 ("changed circumstances or new knowledge may make what was previously permissible no longer so"). Human knowledge of what constitutes harmful activity has developed dramatically. Many activities now almost universally understood to cause public harm – the destruction of wetlands comes to mind – were not recognized as such in the not so distant past.

Rhode Island's system of wetlands regulation is an exercise of its traditional power to regulate public nuisances. The destruction of wetlands causes numerous public and private harms through increased flooding and erosion, the reduction and pollution of available water supply, and the lost commercial and recreational opportunities caused by the degradation of fish and wildlife habitat. *E.g.*, Office of Technology Assessment, U.S. Congress, *Wetlands: Their Use and Regulation* (1984). If the operation of a pig farm may constitute a public nuisance, *e.g.*, *Jewett v. Deerhorn Enterprises, Inc.*, 281 Or. 469, 575 P.2d 164 (Or. 1978), then certainly it is not unreasonable for a legislature to conclude that it is proper to impose restrictions on the filling of wetlands to avoid these insidious impacts. Further, that the trial court found that Palazzolo's project would constitute a common law nuisance, *see* pp. 7-8 *supra*, confirms that the Rhode Island legislation against wetlands destruction is the type of traditional nuisance regulation found acceptable to the

Court in *Lucas*. *See also Jackvony v. Powel*, 67 R.I. 218, 21 A.2d 554 (R.I. 1941) (enjoining activity that interferes with constitutional protection of tidelands).

Therefore, assuming arguendo that he even owns the property, Palazzolo's title is qualified by the possibility that the Legislature might forbid or restrict uses in an exercise of its traditional authority to declare public nuisances. This background principle of Rhode Island law prohibited the wholesale destruction of wetlands proposed by Palazzolo, regardless of when he acquired the property. Therefore, Rhode Island did not engage in a taking, even assuming that Palazzolo could overcome the numerous other problems with his constitutional claim.

The judgment below should be affirmed.

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOSEPH BARBIERI
Deputy Attorney General
Counsel of Record

Attorneys for State of California

January 2001

JAN 3 2001

No. 99-2047

FILED
JAN 3 2001
CLERK

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF SAVE THE BAY – PEOPLE FOR NARRAGANSETT BAY, *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DEMING E. SHERMAN*
STEPHEN J. MACGILLIVRAY
EDWARDS & ANGELL, LLP
2800 Financial Plaza
Providence, Rhode Island 02840
(401) 274-9200
(f) (401) 276-6611

KENDRA BEAVER
SAVE THE BAY – PEOPLE FOR NARRAGANSETT BAY
434 Smith Street
Providence, Rhode Island 02908
(401) 272-3540 ext. 122

JOHN F. HART
1111 East 60th Avenue
Chicago, Illinois 60637
(773) 834-8960

**Counsel of Record*

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Takings Clause was originally understood to apply to laws regulating uses of private property that disrupt the propagation of fish.

2. Whether the State's power to regulate private property to protect the propagation of fish is a background principle of Rhode Island property law.

3. Whether the Takings Clause was originally understood to apply to any regulation of private property that preserves economically viable use.

4. Whether a littoral owner has the right under Rhode Island property law to fill-out submerged or tide-flowed lands.

5. Whether the State's power to regulate private property to protect groundwater from degradation is a background principle of Rhode Island property law.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 5

I. Rhode Island Laws Regulating Private Property to Protect Propagation of Fish Do Not Violate the Takings Clause 5

A. Laws Regulating Private Property to Protect Propagation of Fish Were Not Within the Original Understanding of the Takings Clause 5

B. The State's Power to Regulate Private Property to Protect Propagation of Fish, a Valuable Food Source, Is a Background Principle of Rhode Island Property Law 9

II. No Regulation That Preserves An Economically Beneficial Use of Land Violates the Takings Clause 13

A. Regulation That Preserves An Economically Beneficial Use of Land Falls Outside the Original Understanding of the Takings Clause 14

TABLE OF CONTENTS – Continued

Page

B. Takings Doctrine Contemporaneous With Incorporation of the Takings Clause Into the Fourteenth Amendment Did Not Treat as a Taking a Regulation That Preserved Economically Beneficial Use of Property 20

III. Appellant's Purported Development Rights Were Not Part of His Title 25

A. In Rhode Island, a Littoral Owner Acquires No Right to Fill Out Submerged Or Tide-flowed Lands By Purchasing Upland Property 25

B. The Power to Regulate Private Land Use to Protect Groundwater From Degradation is a Background Principle of Rhode Island Property Law 29

CONCLUSION 30

TABLE OF AUTHORITIES

Page

CASES

Allen v. Allen, 19 R.I. 115 (1895) 27

Austin v. United States, 509 U.S. 602 (1993) 19

Board of Purification of Waters v. Town of East Providence, 47 R.I. 431, 133 Atl. 812 (1926) 13

Brown v. Goddard, 13 R.I. 76 (1880) 25

Chicago, Burlington & Quincy Railway v. Chicago, 166 U.S. 226 (1897) 20

Dawson v. Broome, 24 R.I. 359 (1902) 26

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 21

Florida Rock Industries, Inc. v. United States, 18 F.3d 1560 (Fed. Cir. 1994) 19

Geer v. Connecticut, 161 U.S. 519 (1896) 6, 10, 11, 22

Gerhard v. Bridge Commissioners, 15 R.I. 334 (1886) 27

Greater Providence Chamber of Commerce v. Rhode Island, 657 Atl. 2d 1038 (R.I. 1995) 27

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 21, 23

Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908) ..... *passim*

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) 7, 8, 9

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) ..... *passim*

MacIntyre v. Ohio Elections Commission, 514 U.S. 334 (1995) 9, 19

TABLE OF AUTHORITIES – Continued

Page

Milardo v. Coastal Resources Management Council, 434 Atl.2d 266 (R.I. 1981) 21

Mugler v. Kansas, 123 U.S. 623 (1887) 7

Munn v. Illinois, 94 U.S. 113 (1877) 7, 8

Payne & Butler v. Providence Gas Co., 31 R.I. 295, 77 Atl. 145 (1910) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 2

Providence & Worcester Railroad Co. v. Pine, 729 Atl. 2d 202 (R.I. 1999) 28

Pumpelly v. Green Bay Co., 80 U.S. 166 (1872) 7

State v. Cozzens, 2 R.I. 561 (1850) 11

State v. Kofines, 33 R.I. 211, 80 Atl. 432 (1911) 11

U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) 16

Whitney v. California, 274 U.S. 357 (1927) 24

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985) 14, 21

STATUTES

Conn. Act of Oct. 1785 5

Conn. Act of Oct. 1793 .....5, 6

4 Anne c. 21 (1705) 6

Md. Act of Dec. 19, 1800, ch. 17 17

Md. Act of Dec. 1818, ch. 89 17

Mass. Col. Act of 1743 5

Mass. Act of Feb. 22, 1792 5

TABLE OF AUTHORITIES – Continued

Page

N.C. Act of Nov. 1787, ch. 272 6
N.C. Code of 1821, pp. 568-69 6
N. H. Act of June 18, 1790, ch. 18 5
N. H. Act of Jan. 12, 1795, ch. 19 5
Pa. Col. Act of Mar. 9, 1771, ch. 823 6
Pa. Act of Mar. 5, 1790, ch. 1490 6
R.I. Col. Act of 1735 ..... 5, 10
R.I. Revised Pub. Laws (1798), p. 490 5
R.I. Revised Pub. Laws (1798), pp. 496-97 12
R.I. Public Laws (1844), pp. 532, 534-35, 537, 538 12
R.I. Gen. Laws (1909), ch. 202 ..... 12, 25
R.I. Pub. Laws (1917), ch. 1602 28
R.I. Gen. Laws (1923), ch. 123 13
R.I. Gen. Laws (1923), ch. 230 25
R.I. Pub. Laws (1925), ch. 746 ..... 12, 29
R.I. Gen. Laws (1938), ch. 112 ..... 13, 26, 27
R.I. Gen. Laws (1938), ch. 237 28
R.I. Gen. Laws (1938), ch. 634 ..... 12, 25
R.I. Gen. Laws (1938), ch. 635 29
R.I. Pub. Laws (1942), ch. 1148 ..... 12, 26
R.I. Pub. Laws (1956), ch. 3814 29
R.I. Gen. Laws (1956), sec. 20-3-4 (1998 & 2000 Supp.) 29

TABLE OF AUTHORITIES – Continued

Page

R.I. Gen. Stats. (1872), ch. 133, sec. 2 28
S.C. Act of Mar. 26, 1784, No. 1226 6
S.C. Act of Dec. 21, 1792, No. 1557 6
Act of Feb. 4, 1791, ch. IV, 1 Statutes at Large 189 15
Act of Mar. 3, 1791, ch. XXVII, 1 Stat. 221 15
Act of Apr. 7, 1798, ch. XXVI, 1 Stat. 547 15
Act of Feb. 27, 1801, 2 Stat. 103 8
Va. Act of Oct. 1785, ch. LXXV 17
Va. Act of Oct. 1785, ch. LXXXII 6, 7
Va. Act of Oct. 1789, ch. XIV 15

MISCELLANEOUS

Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law*, 15 Stanford Envtl. L.J. 247 (1996) 9

Fred P. Bosselman et al., The Taking Issue (1973) 14

Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in* Pennsylvania Coal Co. v. Mahon, 106 Yale L.J. 613 (1996) 23

Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 William & Mary L. Rev. 749 (1997) 18

James W. Ely, Jr., *"That due satisfaction may be made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 Am. J. Legal Hist. 1 (1992) 16

TABLE OF AUTHORITIES – Continued

Page

Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) 18

Ernst Freund, The Police Power: Public Policy and Constitutional Rights (1904)..... 20

John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, 94 Northwestern. U. L. Rev. 1099 (2000) 9, 14, 15, 16

John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine*, 109 Harvard L. Rev. 1252 (1996) 9, 16

John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 Am. J. Legal Hist. 253 (1996) 17

8 The Papers of James Madison (Robert A. Rutland et al. Ed., 1973) 7, 8

Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964)..... 18

William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Washington L. Rev. 553 (1972).....16, 17

Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694 (1985).....7, 14

INTEREST OF AMICUS CURIAE

Amicus curiae Save the Bay – People for Narragansett Bay is a not-for-profit organization with its headquarters in Providence, Rhode Island whose purpose is the protection and restoration of Narragansett Bay and adjacent coastal waters.[1] Save the Bay – People for Narragansett Bay has an interest in this case because it presents a fundamental challenge to the authority of the State of Rhode Island and other government agencies to effectively implement legislation protecting the Narragansett Bay and its waters and shores.

STATEMENT OF THE CASE

Save the Bay – People for Narragansett Bay adopts the Statement of the Case presented by respondents Rhode Island and the Coastal Resources Management Council, together with petitioner's statement that "he readily concedes for purposes of review in this Court that he became 'owner' of the property in 1978." Reply to Opposition to Petition for Writ of Certiorari, at 2.

SUMMARY OF ARGUMENT

This case presents the Court with the opportunity to synthesize several strands of the regulatory takings doctrine into a more unified whole. Three lines of reasoning converge to support affirming the decision of the Rhode Island Supreme Court. Concrete evidence of the original understanding of the Takings Clause, pertinent foundational reasoning from the Court's regulatory takings opinions in the early twentieth century, and the Court's

---

[1] Counsel for the parties have consented to the filing of this *amicus* brief, and letters of consent have been filed with the Clerk. No counsel for a party in this case authored this brief in whole or in part. *See* Supreme Court Rule 37.

more recent focus on background principles of property support the same result here.

This brief presents concrete historical evidence of the original understanding of the Takings Clause with regard to regulation, not previously considered by the Court. Statutes imposing regulation of land use were common in America in the early republic. Regulation of land (even for objectives unrelated to health, safety or morality) was a familiar part of the legal landscape. James Madison, who drafted the Takings Clause, was quite familiar with land use regulation based on his experience in the Virginia Assembly and in Congress. This statutory evidence conclusively disproves the modern reason for expanding the Takings Clause beyond appropriation to regulation generally: an assumption that land use regulation only came later and was thus unknown to the framers of the Constitution and Bill of Rights.

More particularly, early state laws restricting the use of private riparian property in order to protect propagation of fish offer examples of early regulation, known to James Madison, that are factually analogous to the fish protection measures of Rhode Island's protection of wetlands, implemented in this case. Then as now, fish were important as food. Affirming the decision below based on evidence of original understanding would bring takings doctrine into harmony with the ordinary meaning of the Constitutional text.

As for the early twentieth century foundations of the Court's modern regulatory takings jurisprudence, Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), if read in its original context, offers clear guidance for resolving the present case. *Pennsylvania Coal*, rather than calling for a new doctrine of regulatory takings, was instead an application of existing doctrine to a new set of facts. As Justice Holmes said in *Pennsylvania Coal* and elsewhere, factual analogies to precedent rather than abstract formulas were critical to the gradual clarification of takings doctrine.

For purposes of resolving the present case, the most analogous decision to turn to among the *Pennsylvania Coal* line of precedents is *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908), another case in which Justice Holmes wrote for the Court. There, in overruling a takings claim raised against a state statute imposing water conservation restrictions on riparian proprietors, Justice Holmes concluded from precedent and principle alike that water conservation and conservation of game were two areas in which the police power definitely prevailed over the rights of property owners, without requiring a State to prove that the conservation measures were essential to satisfy current or projected needs. Conservation measures, for Justice Holmes, were among the doctrinal "boundary stones" already in place. *Id.* at 355. That reasoning is pertinent here because water conservation and conservation of fish and game are among the principal policy objectives behind Rhode Island's decision preserving wetlands in this case.

Also pertinent to the present case is Justice Holmes's explanation of how regulatory takings doctrine would apply to restrictions on an urban building lot. To "limit the height of buildings, in a city," would not require compensation unless the height were limited to such an extent that "an ordinary building lot" would be "wholly useless." *Hudson County Water Co., supra*, 209 U.S. at 355. That reasoning provides a close basis for analogy here, supporting the decision below, because the petitioner's takings claim is based on being allowed to construct buildings only on part of his lot rather than throughout his entire lot. In the wetlands context, building restrictions limit horizontal extension rather than vertical extension, but the same doctrinal boundary line of whether or not the restrictions preserve a valuable use of the building lot should apply.

A third, more recent theme in the Court's takings jurisprudence has been to compare the challenged regulations to "the restrictions that background principles of

the State's law of property and nuisance already in place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). In this case longstanding principles of Rhode Island property law, reflected in court decisions and in statutes, support affirming the decision below.

Rhode Island property law makes clear that the State owns all land that is submerged or flowed by the tide, in trust for the public benefit, that filling out from contiguous dry upland may occur only with the permission of the State, and that an owner of upland does not gain title to the submerged or tidal lands until such permission has been received and detrimentally relied on. These principles of property law derive from the royal charter of 1663 and a long line of decisions of the Rhode Island Supreme Court going back over a century. They are illustrated by various statutory provisions, some over a century old and some tested in court long ago. The public benefit that the State must guard, as the Rhode Island Constitution has made clear since 1843, includes a public right of "fishery." A related principle of Rhode Island property law is that the State may restrict the use of private property, in order to protect the propagation of fish. *See Payne & Butler v. Providence Gas Co.*, 31 R.I. 295, 77 Atl. 145, 158 (1910) ("the whole subject of fisheries, floating and shellfish . . . wherever situate within the public domain of the state of Rhode Island, are under the fostering care of the General Assembly"). Protecting fish populations was one of the reasons the State denied petitioner's application to dredge and fill.

A separate principle of Rhode Island property law is that the State may restrict private property use in order to conserve the quality of water. For most of the last century the State has cautiously supervised sources of drinking water. "Environmentalism" may be of recent vintage, but "conservation" has a long history in Rhode Island. Guarding against pollution of groundwater, the ultimate

source of local drinking water, was one of the reasons the State denied petitioner's application to dredge and fill.

ARGUMENT

I. Rhode Island Laws Regulating Private Property to Protect Propagation of Fish Do Not Violate the Takings Clause

The coastal wetland that petitioner wants to fill "serves as a refuge and feeding ground for fish [and] shellfish." Opinion of Rhode Island Supreme Court (Feb. 25, 2000), Petitioner's Appendix at A-3. Permitting petitioner to fill this wetland "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island." Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-10. Protection of fish was a principal reason for the Decision of the Rhode Island Coastal Resources Management Council (Mar. 3, 1986), denying petitioner's application to fill contiguous wetland. Joint App. at 27.

A. Laws Regulating Private Property to Protect Propagation of Fish Were Not Within the Original Understanding of the Takings Clause

Laws regulating uses of private property to protect propagation of fish from incidental disruption are far older than has been generally recognized. In 1791, when the Fifth Amendment was ratified, many states had laws in effect (some dating from the colonial era) protecting propagation of fish from incidental disruption by water-powered mill dams that obstructed fish swimming upstream to breed. *See* R.I. Col. Act of 1735; R.I. Revised Pub. Laws, p. 490 (1798); Mass. Col. Act of 1743 [App. to 2 Mass. Laws of 1792-1800 (1816)]; Mass. Act of Feb. 22, 1792; N.H. Act of June 18, 1790, ch. 18; N.H. Act of Jan. 12, 1795, ch. 19; Conn. Act of Oct. 1785; Conn. Act of Oct.

1793; Pa. Col. Act of Mar. 9, 1771, ch. 823; Pa. Act of Mar. 5, 1790, ch. 1490; Va. Act of Oct. 1785, ch. LXXXII; N.C. Act of Nov. 1787, ch. 272; N.C. Code of 1821, pp. 568-69; S.C. Act of Mar. 26, 1784, No. 1226; S.C. Act of Dec. 21, 1792, No. 1557.

These laws prohibited, or authorized local authorities to prohibit, building or maintaining dams that obstructed the upstream passage of fish. A dam owner permitted merely to make an opening in the dam sufficient for fish to pass through would be economically burdened for the relevant period of time each year, because the substantial loss of water power entailed by such an opening would greatly reduce the mill's power. *See, e.g.*, Conn. Act of Oct. 1793, 1 Public Statute Laws of Conn. 332 (1808) (dam owners required to "open a sluice-way in such dam twelve feet in width, and within six inches of the bottom of the river").

The fish-passage laws reflected a legislative judgment that the normal operation of an otherwise legitimate mill dam was interfering with the public's right to enjoy this natural supply of food undiminished. *Cf. Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (Holmes, J.) (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)) (a State has right as inheritor of royal prerogative to "make laws for the preservation of game"); this right "flows from the duty of the State to preserve for its people a valuable food supply." *Geer, loc. cit.*, 161 U.S. at 534. Fish have since the earliest settlements served as a valuable food supply for Americans. This was also true for the English, who had their own laws restricting private property in order to protect dwindling fish populations. *See, e.g.*, 4 Anne c. 21, sec. 4 (1705) (requiring owners of diked or banked "meadows," where salmon go, to permit salmon to return to rivers through "cuts");

id., sec. 5 (requiring owners of mill dams to make openings for salmon to pass upstream and downstream).

Regulation protecting the propagation of fish from incidental disruption caused by private land use, then, is well represented in "the laws and practices of our ancestors." *See Mugler v. Kansas*, 123 U.S. 623, 668 (1887) (quoting *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 178 (1872)). Such regulation was conventional when Americans formed the first "State constitutions, or other forms of social compact," *Munn v. Illinois*, 94 U.S. 113, 124 (1877). The existence of the state fish-passage laws suggests strongly that the state conventions that ratified the Fifth Amendment did not understand it to be threatening the states' conventional power to protect propagation of fish in this way. Laws of this character should therefore be recognized as part of the "historical compact recorded in the Takings Clause," like nuisance law, *see Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992); part of a regulatory power that "the Takings Clause did not transform." *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 492 (1987).

The Virginia fish-passage law is particularly significant because of its association with James Madison, author of the initial draft of the Bill of Rights. Madison introduced the Takings Clause of his own volition, rather than in response to the recommendation of a state ratifying convention. *See* Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 Yale L.J. 694, 708-09 (1985). In 1785 Madison himself had introduced Virginia's fish-passage legislation in the Virginia General Assembly. *See* 8 The Papers of James Madison 395 (bill "concerning milldams and other obstructions of water courses") (Robert A. Rutland et al. Ed., 1973); Va. Act of Oct. 1785, ch. LXXXII. This law authorized county courts to protect the upstream passage

of fish from being obstructed by mill dams in "any water course" in the state, navigable or not. *Id.*

The chronological proximity of Virginia's fish-passage law (1785) and the Takings Clause (1789) strongly suggests that when Madison drafted the Takings Clause, he did not intend that it "transform" the States' conventional power to protect propagation of fish from incidental disruption caused by the use of private land. *See Keystone, supra,* 480 U.S. at 492. (Indeed, the Virginia fish-passage law introduced by Madison was contemporaneous with Madison's suggestion of language similar to the Takings Clause for use in a new state's constitution. *See* Letter of Aug. 23, 1785, 8 Papers of James Madison, *supra,* at 351.)

The Virginia fish-passage law is additionally significant because it served as municipal law in the portion of the District of Columbia ceded by Virginia to the federal government. *See* Act of Feb. 27, 1801, 2 U.S. Statutes at Large 103, 104. The Court has viewed laws (not judicially overturned) governing the District of Columbia before the Fourteenth Amendment as good evidence of the original meaning of the Fifth Amendment, because the Bill of Rights directly applied to the District of Columbia from the outset. *See Munn v. Illinois,* 94 U.S. 113, 125 (1877). The Virginia fish-passage law was a comparatively extreme measure, in that permission given to operate a dam under its provisions was only provisional, and had to be applied for again whenever the dam needed repair (a common occurrence). The Virginia fish-passage law was subject to the Fifth Amendment in the District of Columbia beginning in 1801, only ten years after ratification of the Bill of Rights.

The fact that this fish-passage law was not contested in court by mill dam owners even in the District of Columbia suggests that contemporaries believed "the

Takings Clause did not transform" the states' conventional power to protect the propagation of fish by regulating the use of private property. *See Keystone, supra,* 480 U.S. at 492. All of the early fish-passage laws, especially Virginia's, are good evidence of relevant "practices and beliefs held by the Founders" on the subject of regulating land use for purposes of wildlife conservation. *See MacIntyre v. Ohio Elections Commission,* 514 U.S. 334, 360 (1995) (Thomas, J., concurring).

B. The State's Power to Regulate Private Property to Protect Propagation of Fish Is a Background Principle of Rhode Island Property Law

Rhode Island has power to regulate property in order to protect fish by virtue of its 1663 royal charter, and by virtue of its status as successor to the powers of both the Crown and Parliament in 1776. *See Payne & Butler v. Providence Gas Co.,* 31 R.I. 295, 77 Atl. 145, 153 (1910). Rhode Island law before and after ratification of the Takings Clause in 1791 exemplify the exercise of this power. All of the following examples far predate petitioner's 1978 acquisition of the wetland at issue here. *See* Reply to Opposition to Petition for Writ of Certiorari, at 2.

In *Lucas* the Court seemed to suggest that among modern American sources of land use regulation, only the common law of nuisance is as old as the Takings Clause, 505 U.S. at 1028.

This historical premise is incorrect. *See* Fred P. Bosselman, *Limitations Inherent in the Title to Wetlands at Common Law,* 15 Stanford Environmental L.J. 247, 282-303 (1996); John F. Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause,* 94 Northwestern U. L. Rev. 1099, 1107-37 (2000); John F. Hart, *Colonial Land Use Law and Its Significance For Modern Takings Doctrine,* 109 Harvard L. Rev. 1252, 1259-81 (1996).

A regulatory takings opinion by Justice Holmes, having to do with water conservation, illustrates an appropriately more inclusive recognition of the historical sources of regulatory law. Justice Holmes derived the analogous right of States to "make laws for the preservation of game, which seems a stronger case" from each State's status as "the inheritor of a royal prerogative" as well as from the "principle of public interest and the police power." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)). This opinion, taken together with *Lucas*, stands for the principle that regulatory powers found in English law prior to 1776 or American law prior to 1791 should be viewed as not violating the Takings Clause. *See also Lucas*, 505 U.S. at 1035 (Kennedy, J.) (landowner's "reasonable expectations must be understood in light of the whole of our legal tradition").

The power of Rhode Island's Assembly to regulate private land use in order to protect fish propagation from incidental disruption was manifested as early as 1735, when it prohibited the owners of mill dams from obstructing the upstream passage of fish during a defined season, thus imposing a duty of making "good and sufficient" openings in dams. R.I. Col. Act of 1735, R.I. Revised Pub. Laws, p. 490 (1798). This law's burden on investment-backed expectations was quite substantial, in that it included existing as well as future dams. *Id.* The scope of the Act was broad: it applied to "*any* fresh river, brook, or course of water, where *any* fish usually pass," and it protected both upstream and downstream passage ("pass and repass"). *Id.* (emphasis added).

These laws show that Rhode Island regulated private property in order to protect propagation of fish when Independence was declared, and when the Bill of Rights was ratified. Because Rhode Island's power to restrict the

use of private property in order to protect fish was well established in "the understandings of our citizens" when the Takings Clause was ratified in 1791, this power deserves to be accommodated in the "constitutional culture" of the Takings Clause, just as the common law doctrine of nuisance has been accommodated. *See Lucas*, 505 U.S. at 1027-28. This is especially appropriate given the Court's recognition that "the source of the police power as to game birds . . . flows from the duty of the State to preserve for its people a valuable food supply." *Geer, supra*, 161 U.S. at 534 (cited in *Hudson County Water Co., supra*, 209 U.S. at 356 (Holmes, J.)). For the people of Rhode Island, fish have served as a valuable food supply since the earliest settlements.

Rhode Island's regulatory protection of fish has subserved the public right of "fishery," which has also been traced back to the colonial era in Rhode Island law, and derives ultimately from the Charter of 1663. *See Payne & Butler, supra*, 77 Atl. at 153. The Rhode Island Constitution (which replaced the colonial charter as the state's fundamental law in 1843) has always confirmed in its Takings Clause that "[t]he people shall continue to enjoy and freely exercise all the rights of fishery." Art. I, sec. 17. *See Payne & Butler, supra*, 77 Atl. at 153. *See also State v. Kofines*, 33 R.I. 211, 80 Atl. 432, 438 (1911) ("it is necessary to consider how the people of the state may receive the greatest benefit from the conservation of their interests in this regard"); *State v. Cozzens*, 2 R.I. 561, 564 (1850) ("legislative restriction is indispensable to secure to the public the benefit of the oyster fishery").

During all this time, the State has held "title" to "land flowed by tide water;" to "land below high-water mark." And the State's promotion of the public right of fishery has extended throughout such lands.

> [T]he whole subject of fisheries, floating and shellfish . . . wherever situate within the public

> domain of the state of Rhode Island, are under the fostering care of the General Assembly. It is for the Legislature to make such laws regulating and governing the subject of . . . pisciculture, as they may deem expedient.

See Payne & Butler, supra, 77 Atl. at 158.

Rhode Island's early statutes demonstrate that salt "ponds" are among the public waters regulated by the State to protect fish (fin-fish and shell-fish). *See* R.I. Revised Pub. Laws (1798), pp. 496-97; R.I. Public Laws (1844), pp. 532, 534-35, 537, 538. Public rights in salt ponds such as Westerly's are also manifested in early twentieth century statutes. *See* R.I. Gen. Laws (1909), ch. 202, sec. 13 (directing commissioners not to lease any ponds in certain towns for use as private oyster fisheries); R.I. Gen. Laws (1923), ch. 230, sec. 8 (state commissioners authorized to lease "any piece of land . . . , below mean low-water mark" in "Brightman's or Babcock's pond" in Westerly); R.I. Gen. Laws (1938), ch. 634, sec. 1 ("waters" include "*all tide waters* within the state" and "all inland waters of any . . . *pond*") (emphasis added); R.I. Pub. Laws (1942), ch. 1148 (state agency directed to "open and keep open" breachways from salt ponds to the ocean "whenever necessary or desirable to *conserve the marine life in any salt pond*") (emphasis added). Another pertinent illustration of Rhode Island's police power from long before petitioner's 1978 acquisition is found in the zoning act directing the town of Westerly to "promote . . . the *conservation* of . . . *waters*, stream courses and other natural resources." R.I. Pub. Laws (1925), ch. 746, sec. 1 at pp. 350-51 (emphasis added). The separate reference to "waters" and "stream courses," in an act for a coastal town, indicates that Westerly's ponds and marshes were among the town's "waters" eligible for conservation.

Another pertinent statute, illustrating the State's broad power to protect propagation of fish as a food

source, prohibited polluting with sewage any "waters," where "waters" included "all tide waters within the state" and "all inland waters of any . . . pond." R.I. Gen. Laws (1923), ch. 123, sec. 1. The statute defined "sewage" so broadly as to include "every *substance* . . . which would injuriously affect the *natural and healthy propagation, growth, or development of any fish or shell-fish in the waters of this state, or of the nourishment of the same,* or which would injuriously affect the *flavor, taste or value as food of any such fish or shell-fish.*" *Id.* (emphasis added). *Cf.*, R.I. Gen. Laws (1938), ch. 112, sec. 7 (division of harbors and rivers directed to "regulate the depositing of *mud, dirt, and other substances* in the public *tide-waters* of the state") (emphasis added).

The constitutionality of this water pollution statute, including the provision regarding impact on fish, was upheld in *Board of Purification of Waters v. Town of East Providence*, 47 R.I. 431, 434, 133 Atl. 812 (1926). Given the Superior Court's finding that petitioner's planned filling of wetlands "would cause a reduction in the commercial and recreational shellfish and finfish populations in Rhode Island," Pet. App. at B-10 (not disputed on appeal), the Assembly's 1923 definition of "sewage" would today comprehend petitioner's plans.

II. No Regulation That Preserves An Economically Beneficial Use of Land Violates the Takings Clause

Both lower courts found that Rhode Island's restrictions on filling coastal wetlands did not deprive petitioner of all economically beneficial use of his land, because the dry upland portion of the parcel had valuable uses remaining. *See* Opinion of Rhode Island Supreme Court (Feb. 25, 2000), Pet. App. at A-12, 13; Decision of Rhode Island Superior Ct. (Oct. 24, 1977), Pet. App. at B-9, 10.

These findings are not disputed by petitioner. These findings should be recognized as dispositive here, if the Court adheres to either the original understanding of the Takings Clause or the understanding of the regulatory takings doctrine manifested in Justice Holmes's opinions in the era when the Takings Clause was incorporated into the Fourteenth Amendment.

A. Regulation That Preserves An Economically Beneficial Use of Land Falls Outside The Original Understanding of the Takings Clause

Historical research has made it increasingly clear that the Takings Clause was originally understood to apply only to governmental appropriation of private property, not to regulation of private property. *See* Fred Bosselman et al., The Taking Issue 104 (1973); Note, *Origins and Original Significance of the Just Compensation Clause, supra,* 94 Yale L.J. at 710-12; Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, supra,* 94 Northwestern U. L. Rev. at 1131-47. Legislative history from the drafting or the ratification of the Takings Clause contains no suggestion that it was intended to apply metaphorically to regulation, as well as literally to appropriation. *See* Bosselman, The Taking Issue, *supra,* at 99-100; Note, *Origins and Original Significance of the Just Compensation Clause, supra,* 94 Yale L.J. at 791. *Cf. Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 199 (1985) (distinguishes "literally" from "figuratively" taking property).

A fundamental historical point, not previously considered in this Court's regulatory takings opinions, is that regulation of private land (even for objectives unrelated to health, safety or morality) was a common governmental practice in 1791. Broad powers of land use regulation were well known to the framers of the Takings

Clause. This is shown directly by several early Acts of Congress. When Congress admitted Kentucky into the Union, it explicitly endorsed the "conditions" for such admission imposed by a Virginia statute. *See* Act of Feb. 4, 1791, ch. IV, 1 Stat. 189 (1791). One of these conditions was that the right of Virginia and Kentucky to impose forfeiture on unimproved land belonging to each other's nonresident citizens would be suspended for six years. *See* Va. Act of Oct. 1789, ch. XIV, sec. 8.

Congress also required owners of land "at Vincennes or in the Illinois country" who had lived there in 1783 or before to return to their land and occupy it in person, or else forfeit their land. *See* Act of Mar. 3, 1791, ch. XXVII, sec. 2, 1 Stat. 221. Many of the lands in question were held under French title and had already been improved in accordance with the original grant conditions. Congress barred alienation of land claims previously promised to Canadian refugees, thus making such claims less useful and less valuable. *See* Act of Apr. 7, 1798, ch. XXVI, sec. 2, 1 Stat. 547. *See generally* Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause, supra,* 94 Nw. U. L. Rev. at 1139-43. These Acts of Congress were apparently not regarded by James Madison or his contemporaries as implicating the Takings Clause.

In the states, also, regulation of private land for objectives unrelated to health, safety or morality was a common governmental practice in 1791. Contemporary examples of regulating land (after its acquisition) included aesthetic regulation of town buildings, obligatory participation in agricultural projects, restraints on acquisition and alienation, and improvement requirements. *See id.,* 94 Nw. U. L. Rev. at 1107-16, 1117-19, 1122-24, 1127-28. Some of these restrictions imposed or threatened very substantial costs on the landowner. *See id.* at 1134. Federal territories, which were all subject to

just compensation requirements of some form, also enacted laws compelling unwilling landowners to participate in agricultural projects. Extensive regulation of private land use had also occurred in the colonial era. *See* Hart, *Colonial Land Use Law*, *supra*, 109 Harvard L. Rev. at 1259-81.

As of 1791, when the Takings Clause was ratified, no American legislature or court had ever directed that compensation be paid for any of these regulatory restrictions on the use of private land. If someone as articulate as Madison had wanted to alter this status quo, he would have done so unmistakably in the Takings Clause. *See U.S. Term Limits v. Thornton*, 115 S.Ct. 1842, 1875 (1995) ("where the Constitution is silent, it raises no bar to action by the States or the people") (Thomas, J., dissenting).

When land was appropriated, in contrast, the principle of compensation was generally observed in 1791. *See generally* James W. Ely, Jr., *"That due satisfaction may be made:" The Fifth Amendment and the Origins of the Compensation Principle*, 36 American Journal of Legal History 1 (1992); Hart, *Land Use Law in the Early Republic and the Original Meaning of the Takings Clause*, *supra*, 94 Nw. U. L. Rev. at 1134. This was true even for small parcels of land. *See* Ely, *supra*, at 5-6.

A single, isolated exception to observation of the compensation principle by American legislatures was found only in a minority of states. In these states, unimproved (i.e., unenclosed or uncleared) land could still generally be used for highways without compensation. *See* William B. Stoebuck, *A General Theory of Eminent Domain*, 47 Washington L. Rev. 553, 581-82 (1972); Ely, *supra*, 36 Am. J. Legal Hist. at 7-10. Even this isolated exception to the general practice, however, should be understood with reference to two observations.

First, regarding unimproved land in a sparsely developed countryside, "a new road would give more value than it took." Stoebuck, *supra*, 47 Wash. L. Rev. at 582-83. Second, as of 1791 the practice of taking unimproved land without payment was already disappearing. *See, e.g.*, Va. Act of Oct. 1785, ch. LXXV (requiring payment of compensation whenever any land was taken for a highway). By 1791 the only states not yet requiring compensation whenever unimproved land was taken for highways were Georgia, South Carolina, Maryland, Delaware, Pennsylvania and New Jersey. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 581-82; John F. Hart, *Takings and Compensation in Early America: The Colonial Highway Acts in Social Context*, 40 American Journal of Legal History 253, 258-63 (1996).

Of these states, moreover, Pennsylvania and Delaware already effectively observed the compensation principle even for unimproved lands used for highways, because land patents there had included an extra six acres per hundred, for the specific purpose of future highways. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 581; Hart, *The Colonial Highway Acts*, 40 Am. J. Legal Hist. at 261-62. Maryland paid compensation for all highway land in some counties by 1800, *see* Md. Act of Dec. 19, 1800, ch. 17, and throughout the state by 1818. Md. Act of Dec. 1818, ch. 89. Georgia and South Carolina, which both had a thinly populated back-country, seem consistent with the offsetting-benefits principle described by Professor Stoebuck. *See* Stoebuck, *supra*, 47 Wash. L. Rev. at 582-83.

Therefore the conclusion that "[t]he practices of the States *prior* to incorporation of the Takings and Just Compensation Clauses [in 1897] – which . . . occasionally included *outright physical appropriation* of land without compensation – were out of accord with *any* plausible interpretation of those provisions," *Lucas*, *supra*, 505 U.S.

at 1028 n.15 (emphasis in original), is greatly overgeneralized. The practices of most states in 1791 were entirely consistent with a plausible interpretation of those provisions: that appropriation or physical invasion of property was included, while regulation was not. Rhode Island, for example, had since 1715 required compensation when any kind of land was used for a highway, R.I. Col. Stat. 1715, besides requiring compensation for land generally. Six states adhered to the same principle of compensation except for using unimproved land for highways; even in some of these states this exception was reconcilable with the compensation principle. The historical culture of the Takings Clause does not dictate that the early sins of Georgia or New Jersey with respect to highways should today hinder Rhode Island's efforts today to preserve its fisheries.

This evidence that the original understanding of the Takings Clause included appropriation but not regulation is reinforced by considering the ordinary meaning of the Takings Clause. The ordinary meaning of "taken" is "appropriated." Even scholars sympathetic to the regulatory takings doctrine have conceded that the ordinary and original meaning of the Takings Clause embraced appropriation but not regulation. *See* Joseph L. Sax, *Takings and the Police Power*, 74 Yale L.J. 36, 39-40 (1964) (arguing that original distinction between "appropriation" and "regulation" became obsolete after late nineteenth century); Lynda L. Butler, *The Politics of Takings: Choosing the Appropriate Decisionmaker*, 38 William & Mary L. Rev. 749, 753-55 (1997) (similar); *cf.* Richard A. Epstein, Takings: Private Property and the Power of Eminent Domain (1985) ("Categorical reliance upon historical intention must also confront the problem of novel institutions in changed circumstances"). In light of the extensive history of early land use regulation disclosed by recent

research, *supra*, interpreting "taken" to mean "regulated" would today no longer be a plausible reading of the constitutional text, but an anachronism. *Cf. Lucas*, 505 U.S. at 1028 n.15.

In *Lucas*, the Court stated the rule that a land regulation causing "loss of all economically beneficial use" would be deemed a taking unless justified by reference to "background principles of nuisance and property law." 505 U.S. at 1027, 1031. To extend the original and ordinary meaning of the Takings Clause that far only, premised on economic equivalence between appropriation and the loss of all use-value, preserves the textual integrity of the Takings Clause.

But to go further and extend the Takings Clause to other so-called regulatory takings, based on the later premise that all potential value is property, creates a penumbra of very dubious legitimacy. *See MacIntyre v. Ohio Elections Commission*, 514 U.S. 334, 360 (1995) (Thomas, J., concurring) (criticizing "analysis that is largely unconnected to the Constitution's text and history"); *Austin v. United States*, 509 U.S. 602, 628 (1993) (Kennedy, J., concurring) ("we risk anachronism if we attribute to an earlier time an intent to employ legal concepts that had not yet evolved"). Taking into account the ordinary meaning of the Takings Clause together with the original understanding allows for the Court's rule of total takings in *Lucas, supra*, without resorting to "a classic exercise of judicial balancing of competing values." *Florida Rock Industries, Inc. v. United States*, 18 F.3d 1560, 1570 (Fed. Cir. 1994).

B. Takings Doctrine Contemporaneous With Incorporating the Takings Clause Into the Fourteenth Amendment Did Not Treat as Takings Regulations That Preserved Economically Beneficial Use of Property

State law is said to have come within the ambit of the Takings Clause, by virtue of the incorporation doctrine, in *Chicago, Burlington & Quincy Railway v. Chicago*, 166 U.S. 226 (1897). The "practices of the States" prior to that incorporation have been called "entirely irrelevant." *See Lucas*, 505 U.S. at 1028 n.15. If the Court refers instead to the doctrine of regulatory takings of the era that followed incorporation, including Justice Holmes's takings opinions, that analysis will support affirming the decisions of the Rhode Island courts.

A law which "restricts the exercise of rights of property to uses and modes of disposition less profitable than those previously allowed, does not amount to a taking of property, if other profitable methods of disposition remain lawful." Ernst Freund, The Police Power: Public Policy and Constitutional Rights 550 (1904). Justice Holmes made the same point in *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

> [T]he police power may limit the height of buildings, in a city, without compensation. . . . To that extent it cuts down what would otherwise be the rights of property. But if it should attempt to limit the height *so far as to make an ordinary building lot wholly useless*, . . . the police power would fail. To set such a limit would need compensation.

Id. at 355 (emphasis added). Justice Holmes's building-lot hypothetical is analogous to the regulation applicable to petitioner, recognizing that the problem of building out onto wetlands contiguous to dry upland is one of horizontal extension rather than vertical extension.

The *Hudson County Water Co.* principle of upholding land regulation that preserves some value is illustrated best by *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915). There the Court (including Justice Holmes) upheld a zoning ordinance prohibiting brick manufacture against a claim that it deprived the owner of property without due process, even though the land's value allegedly declined from $800,000 to $60,000 (92.5%). *Id.* It was sufficient that some valuable use remained. *See also Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% decrease in value). Thus in *Williamson County Regional Planning Commission, supra*, 473 U.S. at 199, the Court glossed *Pennsylvania Coal* as calling for a court to "distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." *See Milardo v. Coastal Resources Management Council*, 434 Atl.2d 266, 270 (R.I. 1981) (citing *Pennsylvania Coal* for the proposition that compensation is owed "if regulation pursuant to the police power deprives a landowner of all beneficial use of his property").

Justice Holmes's *Hudson County Water Co.* opinion is also relevant to petitioner's regulatory takings claim in other ways. There as here, the interest behind the State regulation was conservation of a natural resource. There the natural resource the State sought to conserve was water; here the State seeks to conserve water as well as the fish and game dependent on the water's natural condition. In *Hudson County Water Co.*, Justice Holmes acknowledged the difficulty of defining the valid reach of the police power in the absence of concretely analogous precedents, but singled out conservation of natural resources as a category where history and principle both supported some relatively clear "boundary stones." 209 U.S. at 355-56.

> [I]t is recognized that the State as *quasi*-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned. . . . This public interest [in water conservation] is omnipresent wherever there is a State . . . . It is fundamental, and we are of opinion that the private property of riparian proprietors cannot be supposed to have deeper roots. . . . the private right to appropriate is subject . . . to the initial limitation that it may not substantially diminish one of the great foundations of public welfare and health.

Id. at 355-56. Justice Holmes also concluded from the same background of history and principle that "the State may make laws for the preservation of game, which seems a stronger case." *Id.* at 356 (citing *Geer v. Connecticut*, 161 U.S. 519, 534 (1896)).

Justice Holmes's opinion in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), is very much continuous with that in *Hudson County Water Co., supra.* In discussing generally the problem of drawing a boundary between "property" and "police power," the two opinions are highly similar. *See Hudson County Water Co.*, 209 U.S. at 355-56 ("All rights tend to declare themselves absolute," but "all are limited by the neighborhood of principles of policy;" the "boundary at which the conflicting interests balance cannot be determined by any general formula in advance"); *Pennsylvania Coal*, 260 U.S. at 415 (rights of property are "seemingly absolute," but are "qualified by the police power"); *id.* at 416 ("this is a question of degree – and therefore cannot be disposed of by general propositions").

The *Pennsylvania Coal* opinion, if read in isolation, may seem to announce the beginning of a new doctrine, a

very modern-sounding proposal that courts should simply use their own sense of reasonableness to judge for themselves when the government goes "too far." 260 U.S. at 415. But that is a mistaken reading. The Court did not inaugurate a new doctrine of regulatory takings in *Pennsylvania Coal;* it persevered in its prior project of clarifying the boundary between police power and property rights based on analogies to precedent, informed by "principle" and "tradition," *see* 260 U.S. at 416. *See id.* ("the cases decided by this Court"); Robert Brauneis, *"The Foundation of Our 'Regulatory Takings' Jurisprudence": The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 Yale L.J. 613, 666 (1996) (Justice Holmes and the 1922 Court viewed *Pennsylvania Coal* not as "a seminal case," but as "one among many that incrementally established the limits of the police power"). For Holmes, a number of doctrinal "boundary stones" were already in place at the time of *Pennsylvania Coal. See Hudson County Water Co.*, 209 U.S. at 355. When Justice Holmes wrote in *Pennsylvania Coal* that the circumstances of the coal case went beyond "the cases decided by this Court," 260 U.S. at 416, the cases he had in mind surely would have included *Hadacheck, supra* (in which he had joined the majority) and *Hudson County Water Co., supra.* His statement implies that the decrease in property value threatened in *Pennsylvania Coal* exceeded the 92.5% decrease the Court had upheld only seven years before in *Hadacheck, supra,* 239 U.S. at 405. *See Pennsylvania Coal,* 260 U.S. at 414 ("To make it commercially impossible to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it").

As a basis for analogy, however, *Pennsylvania Coal* is much less germane to petitioner's claim than *Hudson County Water Co.* is. In *Pennsylvania Coal,* the Contract

Clause claim was central to the holding, as shown in the final sentences:

> The question at bottom is upon whom the loss of the changes desired should fall. So far as private persons or communities have seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger warrants the giving to them greater rights than they bought.

260 U.S. at 416. In *Hudson County Water Co.*, the Contract Clause claim was peripheral to the holding; it elicited "but a few words more." 209 U.S. at 357. Petitioner's claim against Rhode Island's coastal management authorities raises no Contract Clause claims.

Another important distinction is that in *Pennsylvania Coal* the Court viewed the asserted public interest as dubious ("limited"), because the statute did not ordinarily apply when the surface was "owned by the owner of the coal," and because the purported safety objectives "could be provided for by notice." 260 U.S. at 414. *See Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring, joined by Holmes, J.) (citing *Pennsylvania Coal* as exemplifying "[p]rohibitory legislation . . . invalid, because unnecessary"). In *Hudson County Water Co.*, however, the Court emphatically denied that the State needed to demonstrate the necessity for a regulation aimed at conserving natural resources.

> We are of opinion, further, that the constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . It finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will.

209 U.S. at 356-57. In this case, similarly, petitioner does not dispute that Rhode Island's program of conserving fish and water quality constitutes "a great public good." *Id.* at 357.

III. Appellant's Purported Development Rights Were Not Part of His Title

A. In Rhode Island, a Littoral Owner Acquires No Right to Fill Out Submerged or Tide-Flowed Lands By Purchasing Upland Property

Appellant claims that the State of Rhode Island has taken his property rights in submerged and tidal lands by denying him permission to extend his (dry) upland by filling out the land beyond the normal high tide line. Long-standing rules of Rhode Island property law, as determined by its courts and as illustrated by its statute law, flatly contradict appellant's claim. These rules go back in time much earlier than 1978, when petitioner acquired his interest in the subject property. Reply to Opposition to Petition for Writ of Certiorari, at 2.

The State, because it succeeded to the Crown's title in 1776, acquired all land up to the normal high tide line at that time. *See Payne & Butler, supra*, 77 Atl. at 153. A private plat or deed defining submerged or tidal lands as part of an upland parcel gives the purchaser no additional rights as against the State. *See Brown v. Goddard*, 13 R.I. 76, 81 (1880).

Salt ponds such as Westerly's are public waters. *See* R.I. Gen. Laws (1923), ch. 230, sec. 8 (state commissioners authorized to lease "any piece of land . . . , below mean low-water mark" in "Brightman's or Babcock's pond" in Westerly for cultivating shell-fish); R.I. Gen. Laws (1909), ch. 202, sec. 13 (directing commissioners not to lease any ponds in certain towns for use as private oyster fisheries); R.I. Gen. Laws (1938), ch. 634, sec. 1 ("waters" include

"all tide waters within the state" and "all inland waters of any . . . *pond"*) (emphasis added); R.I. Pub. Laws (1942), ch. 1148 (state agency directed to "open and keep open" breachways from salt ponds to the ocean "whenever necessary or desirable to *conserve the marine life in any salt pond"*) (emphasis added).

On many occasions Rhode Island has indeed given permission to shore landowners to fill out "flats" from dry upland. And appellant is not the first upland owner to perceive a "taking" in a decision by the State not to *give* that permission. As long ago as 1902, parties who asserted a right to "fill out . . . into tide water" simply by virtue of owning littoral upland were reminded by the Rhode Island Supreme Court that although such filling out had in the past been "very freely permitted," receiving permission in a particular case must still depend upon the "interests of the state." *Dawson v. Broome*, 24 R.I. 359, 363, 366, 368 (1902). The State's permission to fill out from dry upland is essentially a matter of releasing public rights rather than regulating pre-existing rights of that person.

The State has held its right of controlling lands below high tide (separate from its title to such lands) since 1776, when it succeeded to the powers of Parliament on this point. *See Payne & Butler, supra*, 77 Atl. at 153. The State has long delegated to particular agencies responsibility for deciding whether to grant permission to fill out tide-flowed lands. This can be seen using the code of 1938. While its language was different from today's, the obligation to obtain prior state approval before filling land like appellant's was just as clear then as it is now. The "division of harbors and rivers" had "control and supervision of all the harbors and tide-waters of the state." R.I. Gen. Laws (1938), ch. 112, sec. 7; *"tide-waters"* included *"flats"* such as appellant's. *See id.*, sec. 11 (emphasis added). The

division was to "regulate the depositing of *mud, dirt, and other substances* in the public *tide-waters* of the state, and . . . *prescribe the places* where the same may be deposited." R.I. Gen. Laws (1938), ch. 112, sec. 10 (emphasis added). Thus the division had power to authorize or prohibit such deposits in certain locations; its authority was not merely ministerial. Perhaps most significantly for present purposes, *"preservation"* was identified as part of promoting "the interests of the state therein." *Id.*, sec. 7 (emphasis added).

Specific procedures were required before anyone could "build into . . . public tide-waters, by authority of said division . . . , or *fill any flats.*" R.I. Gen. Laws (1938), ch. 112, sec. 11 (emphasis added). Work could not begin until after the developer gave "written notice" to the division, and after the division chief issued written approval of "plans of any proposed wharf or other structure and of *the flats to be filled.*" *Id.* (emphasis added). Here again, the regulation was not merely ministerial. The division chief could "alter the said plans at his discretion." *Id.*

Even when the State has given a landowner explicit permission to fill out tide-flowed lands, the State still has the power to reconsider and withdraw that permission until the filling has actually occurred or the landowner has at least relied detrimentally on the permission received. *See Gerhard v. Bridge Commissioners*, 15 R.I. 334, 335 (1886) ("even the establishment of a harbor line does not transfer the fee to the riparian owner, but only operates as a license to him to fill out"); *Allen v. Allen*, 19 R.I. 115, 116 (1895) ("Until actual filling out, the public rights exist as before"); *Greater Providence Chamber of Commerce v. Rhode Island*, 657 Atl. 2d 1038, 1044 (R.I. 1995) ("The state can, however, at any time, place restrictions on the

filling in of shoreline provided it does so before a landowner has changed position in reliance on government permission"). *Cf. Providence & Worcester Railroad Co. v. Pine*, 729 Atl. 2d 202, 205-06 (R.I. 1999) (distinguishing land claims turning on "Harbor Line Acts" of 1866, 1870).

This case law explains why appellant acquired no vested right to fill his tide-flowed land when his application to do so was granted by the Division of Harbors and Rivers in April 1971: he had taken no steps towards doing the actual filling before the Division withdrew permission in November 1971, based on reconsideration of the circumstances. *See* Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-2,3.

The State's title to submerged lands and tide-flowed lands below the high tide line has also been manifested by its leasing to private persons the public's right to occupy and use portions of such lands for private oyster fisheries. This practice began in the 1820s. *See generally Payne & Butler, supra*, 77 Atl. at 156-58 (discussing Rhode Island statutes of 1822, 1827); R.I. Gen. Stats. (1872), ch. 133, sec. 2 (authorizes commissioners to lease "any piece of land within the state, covered by tide water at low tide, and not within any harbor line," for private oyster fishery).

The State can also occupy and use lands below the high tide line itself. This is shown by a statute that has authorized commissioners of shell fisheries, in planting and cultivating shell-fish, to "occupy . . . to the exclusion of all persons, . . . any portion of . . . land within the state *covered by tide-water, at either high or low tide*, not within any harbor line," unless such land was already being used to raise shellfish. R.I. Pub. Laws (1917), ch. 1602, sec. 1 (emphasis added). This provision has remained in effect for over eighty years. *See* R.I. Gen. Laws (1938), ch. 237,

sec. 1; R.I. Pub. Laws (1956), ch. 3814; R.I. Gen. Laws (1956), sec. 20-3-4 (1998 & 2000 Supp.).

B. The Power to Regulate Private Land Use to Protect Groundwater From Degradation is a Background Principle of Rhode Island Property Law

An early regulatory takings opinion by Justice Holmes states that "the State as quasi-sovereign and representative of the public has a standing in court to protect . . . the water . . . within its territory, irrespective of the assent or dissent of the private owners of the land most immediately concerned." *Hudson County Water Co., supra*, 209 U.S. at 355. Rhode Island's objective of protecting the quality of its drinking water has long included private property within its ambit. *See* R.I. Gen. Laws (1938), ch. 635, sec. 1 ("No person shall . . . suffer to be thrown or discharged, into any well [or] pond . . . used as a source of water supply for drinking purposes by any . . . town . . . , or into any known tributary or feeder of any such [well, pond, etc.], any . . . thing . . . impairing or tending to corrupt the purity of the waters of any such . . . known tributary or feeder"); P.L. (1925), ch. 746 (directing town of Westerly to "facilitate the adequate provision of . . . water"). Given modern knowledge of the impact on groundwater caused by filling wetlands, those statutes would authorize protecting groundwater from degradation such as the "increased harmful nitrate levels" threatened by petitioner's plans, because "groundwater is the sole source of drinking water." Decision of Rhode Island Superior Court (Oct. 24, 1977), Pet. App. at B-10 (findings not disputed on appeal).

Petitioner is essentially asking this Court to make Rhode Island wait until the point when *any* additional nitrates will contaminate currently utilized sources, before implementing a groundwater conservation policy in connection with applications to fill out into wetlands. But as Justice Holmes stated for the Court long ago, the "public interest" in water "is omnipresent . . . , and grows

more pressing as population grows." *Hudson County Water Co., supra,* 209 U.S. at 356.

Justice Holmes also addressed the question of whether the regulatory takings doctrine requires a State trying to conserve its useable water to prove that its conservation efforts are *essential* to prevent harm. "[T]he constitutional power of the State to insist that its natural advantages shall remain unimpaired by its citizens is not dependent upon any nice estimate of the extent of present use or speculation as to future needs. . . . [The State] finds itself in possession of what all admit to be a great public good, and what it has it may keep and give no one a reason for its will." *Id.* at 356-57.

CONCLUSION

For the reasons set forth above, the decision of the Rhode Island Supreme Court should be affirmed.

Respectfully submitted,

DEMING E. SHERMAN*
STEPHEN J. MACGILLIVRAY
EDWARDS & ANGELL, LLP
2800 Financial Plaza
Providence, Rhode Island 02840
(401) 274-9200
(f) (401) 276-6611

KENDRA BEAVER
SAVE THE BAY – PEOPLE FOR
NARRAGANSETT BAY
434 Smith Street
Providence, Rhode Island 02908
(401) 272-3540 ext. 122

JOHN F. HART
1111 East 60th Avenue
Chicago, Illinois 60637
(773) 834-8960

Counsel of Record

JAN 3 2001

No. 99-2047

IN THE

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

BRIEF OF *AMICI CURIAE* NATIONAL WILDLIFE FEDERATION, AUDUBON SOCIETY OF RHODE ISLAND, ENVIRONMENT COUNCIL OF RHODE ISLAND, ENVIRONMENTAL DEFENSE, MUNICIPAL ART SOCIETY OF NEW YORK, NATIONAL TRUST FOR HISTORIC PRESERVATION, NATURAL RESOURCES DEFENSE COUNCIL AND SIERRA CLUB IN SUPPORT OF RESPONDENTS

GLENN P. SUGAMELI
NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W.
Suite 501
Washington, DC 20036-2266
(202) 797-6865

VICKI L. BEEN
Counsel of Record
C/O NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Suite 314-H
New York, New York 10012
(212) 998-6223

Attorneys for Amici Curiae

164437

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I. PALAZZOLO NEVER FILED A *MEANINGFUL* APPLICATION FOR DEVELOPMENT PERMISSION, BECAUSE HE APPLIED TO BUILD A "BULKHEAD" AND A "RECREATIONAL BEACH FACILITY" RATHER THAN THE RESIDENTIAL SUBDIVISION HE NOW CLAIMS WAS TAKEN, AND HE FAILED TO BUILD A RECORD THAT SHOWS HOW MANY HOME-SITES HE COULD DEVELOP ON THE PROPERTY. 10

A. The Court has consistently required property owners to file a meaningful application for an economically viable project before bringing a takings claim. 10

B. Palazzolo has not submitted even one meaningful application to use the land for residential development, and his

Contents

Page

requests for permits for non-residential development are no substitute because denial of those permits does not reveal the extent of the residential use that the agency will allow. 12

C. Palazzolo's allegation that CRMC's refusal to allow "any" development deprived him of all beneficial use does not excuse his obligation to submit a meaningful application for the development he now claims is the only beneficial use of the property. 16

D. Palazzolo did not prove that a proposal to develop upland portions of the property would be futile. 22

II. SANCTIONING PALAZZOLO'S END-RUN AROUND THE MEANINGFUL APPLICATION REQUIREMENT WOULD UNDERMINE THE EFFICIENCY, FAIRNESS AND ACCURACY OF REGULATORY PERMITTING PROGRAMS .. 24

CONCLUSION 29

TABLE OF CITED AUTHORITIES

Page

Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 10, 11

City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687 (1999) 1

Dolan v. City of Tigard, 512 U.S. 374 (1994) 1

Gilbert v. City of Cambridge, 932 F.2d 51 (1st Cir. 1991) 22, 23

Greenbrier, Ltd. v. City of Alabaster, 881 F.2d 1570 (11th Cir. 1989) 19, 20

Greenbrier (Lake County Trust Co. No. 1391) v. United States, 40 Fed. Cl. 689 (1998), *aff'd*, 193 F.3d 1348 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 2740 (2000) 23

Heck v. United States, 37 Fed. Cl. 245 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998) 23

Herrington v. County of Sonoma, 857 F.2d 567 (9th Cir. 1988) 22

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) 1, 10, 28

Johnson v. Fankell, 520 U.S. 911 (1997) 12

Cited Authorities

	Page
Kaiser Dev. Co. v. City and County of Honolulu, 649 F. Supp. 926 (D. Haw. 1986), *aff'd*, 898 F.2d 112 (9th Cir. 1990)	18
Kinzli v. City of Santa Cruz, 620 F. Supp. 609 (N.D. Cal. 1985), *aff'd*, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987)	18
Kinzli v. City of Santa Cruz, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987)	18
Larson v. Multnomah County, 854 P.2d 476, *clarified on reconsideration*, 859 P.2d 574 (Or. Ct. App. 1993)	18
Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)	1, 27
MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986)	10, 11, 12, 14, 16, 17, 20, 22
Mayhew v. Town of Sunnyvale, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999)	19, 20
Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987)	1
Palazzolo v. Coastal Resources Management Council, 657 A.2d 1050 (R.I. 1995)	6

Cited Authorities

	Page
Paquette v. Zoning Bd. of Review, 372 A.2d 973 (R.I. 1977)	26
Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)	1, 10, 12, 17
San Diego Gas & Elec. Co. v. San Diego, 450 U.S. 621 (1981)	11
Suitum v. Tahoe Reg'l Planning Agency, 520 U.S. 725 (1997)	1
Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	10, 11, 12, 17, 18, 20, 22
United States Constitution:	
Fifth Amendment	2, 9
Statute:	
R.I. Gen. Laws § 46-23-1	27

Cited Authorities

Page

Other Authorities:

Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High Hazard Areas*, 78 N.C.L. Rev. 1535 (2000) 27

Ibbotson Associates, Stocks, Bonds, Bills, and Inflation 1997 Yearbook 21

Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's CongressDailyAM (Mar. 14, 2000) 20

Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983) 26

Eric H. Steele, *Participation and Rules — The Functions of Zoning*, 1986 Am. B. Found. Res. J. 709 26

Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urb. Law. 177 (1999) 20

Senate Committee on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242 (1998) 21

INTEREST OF *AMICI CURIAE*

Amici curiae National Wildlife Federation, Audubon Society of Rhode Island, Environment Council of Rhode Island, Environmental Defense (formerly the Environmental Defense Fund), Municipal Art Society of New York, National Trust for Historic Preservation, Natural Resources Defense Council, and Sierra Club are independent not-for-profit state and national membership organizations dedicated to the wise use and conservation of our cultural and natural resources, including wetlands and other sensitive coastal habitats.[1]

Various of the *amici* have participated in cases defending state efforts to protect wetlands, and have filed *amicus curiae* briefs in takings cases before the Court, including *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

STATEMENT OF THE CASE

Although the Court granted certiorari on three questions, we focus on the question that logically comes first — whether Palazzolo's takings claim is ripe for review. Our statement of the case therefore highlights those facts relevant to the ripeness issue, and our arguments demonstrate that the claim does not satisfy the Court's ripeness requirements. Should the Court nevertheless reach the other questions presented by the Supreme Court of Rhode Island's dicta, we believe the Court should affirm.

---

1. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amici* and their counsel made any monetary contribution to the preparation or submission of this brief. This brief is being filed with the written consent of the parties, which has been filed with the Court.

Anthony Palazzolo owns a parcel containing both uplands and a salt marsh that his own witness described as "extremely valuable in terms of plant species . . . and as a habitat for birds." J.A. 35. Palazzolo filed two half-hearted, incomplete and vague applications with the State of Rhode Island to fill the marsh and build either a bulkhead or a recreational beach facility. During the administrative review of those applications, Palazzolo denied that he intended to use the land for residential development. When regulatory authorities found he had not carried his burden of proof on his applications to fill the marsh, however, he suddenly changed tunes, filing a takings claim alleging that the State had taken his land by not allowing him to build a subdivision of seventy-four homes. He now argues that applications for permits that had nothing to do with residential use of either the uplands or the marsh served to ripen his claim that his interest in residential development was taken.

What is at stake in this case is whether Palazzolo's "hide-the-ball" approach to the permit process will be allowed to undermine well-established legal doctrines the Court has carefully crafted. These doctrines ensure that the courts can accurately assess whether administrative agencies have reached an accommodation between the rights of property owners and the equally important rights of neighbors and the public that does not trigger the Fifth Amendment's compensation requirement.

In 1959, Palazzolo paid approximately $8000 for an undivided one-half interest in a plot of land adjacent to Winnapaug Pond that consisted primarily of salt marsh. Pet. App. B-2. The day after that transaction, Palazzolo and his co-owner transferred the land to Shore Gardens, Inc. (SGI), a corporation for which Palazzolo served as President.[2] *Id.* The property had been platted into residential lots decades earlier, and SGI filed a plat further subdividing the property into eighty residential lots. Pet. App. A-3. Over the following two years,

2. In 1969, SGI acquired the remainder of the plot at issue here for another $5000. Pet. App. B-12.

SGI transferred eleven of the lots to others for consideration that is not disclosed on the record. J.A. 76-79.

In 1962, SGI applied to the Division of Harbors and Rivers (DHR) of the Rhode Island Department of Natural Resources for permission to dredge Winnapaug Pond and to fill the salt marsh "to make it adaptable for useful development." Pet. App. B-2. The following year, after DHR returned the application because it was incomplete, SGI submitted another application, seeking permission to dredge the pond, fill the property, and construct a bulkhead. *Id.* In 1966, SGI submitted yet another application, again to dredge and fill, this time for the purpose of constructing a "recreational beach facility." *Id.*

In 1971, DHR first approved the applications, then quickly revoked that approval. *Id.* at B-2 to B-3. SGI let the matter drop, and never appealed the denial or pursued other development options. In 1978, Palazzolo became the owner of the property because the Rhode Island Secretary of State revoked SGI's corporate status. *Id.* at B-8. In the intervening years, DHR's successor agency, the Coastal Resources Management Council (CRMC) adopted a Coastal Resources Management Program ["Regulations"], which generally prohibits the filling of coastal wetlands. Resp't App. A-19.

Under the Regulations, Palazzolo's property is defined as a "developed barrier beach" and "coastal wetlands" in a "Type II" water. *Id.* at A-15 to A-16. Fill is prohibited in the coastal wetlands "unless the primary purpose of the alteration is to preserve or enhance the feature as a conservation area" or "unless [fill is] a consequence of an approved mosquito-control ditching project." *Id.* at A-19. Residential structures are allowed, however, on developed barrier beaches, subject to CRMC "assent." *Id.* at A-16. The Regulations require that an applicant for CRMC's assent to residential structures obtain various "prerequisites" before filing the application, including "a local building permit or a letter from the building inspector stating that all local requirements will be met and a permit will be issued," and either a permit from the Department of Environmental Management if the homes will be serviced by

individual sewage disposal systems (ISDS) or confirmation that connections to public water supply and sewer systems will be available. *Id.* at A-19 to A-20.

Section 130 of the Regulations gives CRMC limited flexibility to grant a "special exception" to the prohibitions against fill. An applicant for such an exception must demonstrate that "[t]he proposed activity serves a compelling public purpose which provides benefits to the public as a whole as opposed to individual or private interests," and is either related to a public infrastructure project, "a water-dependent activity that generates substantial economic gain to the state," or "an activity that provides access to the shore for broad segments of the public." *Id.* at A-13. Further, the applicant must show that "all reasonable steps shall be taken to minimize environmental impacts" and that "[t]here is no reasonable alternative means of, or location for, serving the compelling public purpose." *Id.*

In 1983, Palazzolo sought a special exception from CRMC under § 130, submitting an application nearly identical to SGI's 1963 application, and requesting permission to "restore property line, protect and prevent further erosion, to fill property to elvation[sic] 6.5 ft, to prepare property for use as designated by zoning regulations . . . and construct bulkhead . . . ." J.L.1 tab 5. CRMC's biologist recommended that the special exception be denied, noting that "the applicant has made no attempt to provide information to support the need or justification for the alteration sought." J.A. 4. Similarly, CRMC's engineer recommended that the special exception be denied, after first noting that the drawings were "very vague and inadequate" and the "plans very poor," despite the staff's efforts to obtain better documentation from Palazzolo. *Id.* at 7. The engineer highlighted, for example, that Palazzolo had not provided necessary information about "final grades and contours," and had not addressed "impacts from runoff, flooding, and biological concerns." *Id.* at 8. The engineer also noted that the proposal might be internally inconsistent, because it stated that "no sewage disposal systems are being applied for," but also proposed to "prepare property for use as designated by zoning

regulations," even though one of the uses allowed under the property's "W1, Residential and other" zoning was residential, which obviously would require a disposal system. *Id.*

At the public hearing on the application, Palazzolo was questioned about his development plans. Palazzolo replied that "I can honestly say I spent twenty years trying to get to the first stage. I haven't given serious thought to the second stage . . . ." J.A. 11. When asked whether he would build on the fill, he replied "not necessarily." He then explained that he sought to fill the land "because it's my right to do if I want to . . . ." *Id.* Asked if the land would pass percolation tests,[3] Palazzolo responded "it is not necessary at this time. It would be necessary if I said I wanted to build houses. I am not saying that." Resp't App. A-24.

Not surprisingly, CRMC denied the permit, after reciting the many inadequacies in the documentation provided with the application, and the "complete lack of evidence demonstrating to this Council the need and demand for the proposed activity." J.A. 16-18.

Palazzolo's next application, in 1985, also was half-hearted. Although CRMC's engineer's field report for the 1983 application had noted that the soil was unsuitable for road or other fill, Palazzolo proposed a 50-car parking lot, along with picnic tables, barbecue pits and a trash dumpster, to form a "recreational beach facility." Pet. App. B-3. The application again was "extremely vague" and "rudimentary," J.A. 61-62, and Palazzolo's defense of the proposal was desultory, at best. Palazzolo's engineer acknowledged the environmental harm the fill would cause, and conceded that the beach club was not necessary to provide public access to the pond. *Id.* at 34. Palazzolo also called as a witness an expert in environmental plant physiology, who testified that the land is "an extremely valuable salt marsh and should be preserved." *Id.* Again, CRMC predictably denied the application. *Id.* at 35.

3. Percolation tests measure the absorption and drainage characteristics of land to determine whether it is suitable for septic systems.

Palazzolo then began several leisurely legal challenges to the denial. In April 1986, he filed an appeal from CRMC's decision. The appeal languished until 1993, when Palazzolo first attempted to withdraw the appeal, then changed his mind. *Id.* at 32. Judge Israel of the Rhode Island Superior Court upheld CRMC's 1985 decision, finding that the decision "was based on the plain weight of the evidence before it that the plaintiff's proposed activity served no compelling public purpose." *Id.* at 39.

In 1988, Palazzolo filed the takings claim at issue here. His original Complaint asserted that the Town of Westerly,

> by virtue of its failure to properly regulate the dumping and discharge of sewerage into Winnipaug [sic] Pond has caused . . . Plaintiff's land to become eroded and flooded and caused what had been Plaintiff's Pond frontage and buildable land to be turned into a natural cesspool which is marshy and unbuildable.

Resp't App. A-27. The Town and CRMC "by their refusal to correct or to allow Plaintiff to correct the problems caused by the discharge and dumping of sewerage and other materials into the pond have deprived Plaintiff of all beneficial use of his property . . . ." *Id.* at A-30.

That Complaint was dismissed for lack of prosecution six years after it was filed, but was later reinstated. *See Palazzolo v. Coastal Resources Management Council*, 657 A.2d 1050 (R.I. 1995). Palazzolo then filed an Amended Complaint in October 1995 that omitted his concerns about too much sewage being allowed to enter the Pond and alleged instead that "as a direct and proximate result of the Defendants' refusal to allow any development of the property, there has been a taking . . . ." J.A. 45, ¶ 17.

In discovery, Palazzolo revealed that he based his takings claim on a plan to develop seventy-four home-sites on the property (a density of approximately four lots per acre). J.A. 48. No longer interested in the proposed recreational facility, he submitted no evidence at trial regarding that facility's value

or feasibility. Instead, his sole evidence about the value of the land was the report and testimony of William Coyle, a real estate appraiser, who based his appraisal on one "comparable" sale that took place two years after the date of the alleged taking. J.L.1 tab 7, at 14. Coyle's appraisal assumed that the subdivision would be built at the density Palazzolo had platted, that engineering and other development costs would be "normal," and that there would be no legal constraints upon the development of the land other than the challenged Regulations. *Id.* at 14-16, 22.

The trial revealed very serious problems with Palazzolo's estimates of the potential value of the land for residential use. The Town of Westerly's zoning does not permit development at the density the appraisal assumed. Pet. App. A-13 n.7. Nor was there any evidence that the septic system permits the appraiser had assumed would be available would in fact be granted. *Id.* Indeed, the evidence suggested otherwise. J.A. 55-57. The State's expert testified that under a realistic estimate of the costs of developing the property, given the engineering difficulties posed by problems of sewage disposal, the net profit from developing the property for a subdivision would be only $55,000. He opined that "the net overall value of $55,000 when you are going to expend in excess of four million dollars in construction costs, would be a great folly because there is too much risk involved for this type of development just to translate to a nominal $55,000 value." *Id.* at 101.

In contrast, he testified that the value of Palazzolo's upland lot at the eastern end of Shore Gardens Road as of 1986, the date of the taking, would be $194,000, after deducting for the costs of making the lot buildable. *Id.* at 103-04. Palazzolo did not contest that evidence. Pet. App. B-5, B-10.

The evidence at trial also showed that the subdivision plan would pose grave environmental threats. Residential use at such a density would likely cause levels of nitrogen in the water to be two and one-half times the federal drinking water standard, and nearly thirty times higher than the concentration believed to cause eutrophication of estuarial waters. J.A. 55-57, 87-90.

It would destroy twelve percent of the salt marsh habitat bordering Winnapaug Pond, and therefore would have a significant impact on the productivity of the pond as a fish and wildlife habitat. *Id.* at 84-85. The evidence also showed that the development would be out of character with the surrounding area because development had been "confined pretty well exclusively to the upland portion . . . that immediately abuts the northern side of Atlantic Avenue." Resp't App. A-36. The few exceptions — "two . . . or several" existing houses built on fill — were "structures that predated [CRMC]." *Id.*

Based on that evidence, the trial judge found that the "plaintiff's proposal would constitute a public nuisance." Pet. App. B-11. He based his finding on "evidence of the probability of an increase in nitrate levels in Winnapaug Pond and the threat to groundwater" and evidence "that high levels of nitrate in groundwater poses a public health threat because groundwater is the sole source of drinking water." *Id.* Judge Williams also found that the State's "uncontradicted" evidence about the value of the property demonstrated that "the plaintiff did not lose all beneficial use" of the property. *Id.* at B-10. Further, he found that "plaintiff has not been prevented nor would he be prevented from developing the [upland portion of the] property," and that plaintiff "is able to pursue a smaller and more appropriate proposal to develop the subject property." *Id.* at B-11 to B-12.

SUMMARY OF ARGUMENT

Palazzolo's applications for special exceptions to fill his wetlands for "erosion control" and a "recreational beach facility" do not constitute meaningful applications for permission to develop the property for residential use, because denial of those applications reveals nothing about how much of the land could be used for home-sites. The applications for fill, along with Palazzolo's denials that he intended to use the land for residential development, shifted attention away from the portions of the property that could be developed without fill. As a result, while the record shows that at least one house could be built on one of the uplands on the property, it reveals neither how many

acres of uplands the property contains nor how many more houses could be built on those uplands. Palazzolo's assertion that some fill is required for economically viable use of the land, and that denial of the applications for special exceptions therefore ripens his claim by revealing that no fill will be permitted, is contrary to allegations of the Amended Complaint, contrary to the trial court's findings, and contrary to this Court's decisions.

Palazzolo's "hide-the-ball" strategy of applying for one thing, then claiming that something entirely different was taken, threatens to undermine administrative processes by allowing applicants to circumvent the rules that federal, state and local regulatory agencies have developed for coordinating their review of permit applications. Further, such a shell-game scheme denies interested parties and the public the opportunity to be heard on the true intended use of the land, and deprives regulatory agencies of critical evidence those parties might offer about the potential nuisance and other harms the intended use of the property would inflict. Regulatory agencies cannot responsibly assess the harms a use of land would impose upon neighbors or the public if property owners are allowed to submit sham applications in order to circumvent the ripeness rules the Court has held are required by the very nature of the Fifth Amendment.

ARGUMENT

I. PALAZZOLO NEVER FILED A *MEANINGFUL* APPLICATION FOR DEVELOPMENT PERMISSION, BECAUSE HE APPLIED TO BUILD A "BULKHEAD" AND A "RECREATIONAL BEACH FACILITY" RATHER THAN THE RESIDENTIAL SUBDIVISION HE NOW CLAIMS WAS TAKEN, AND HE FAILED TO BUILD A RECORD THAT SHOWS HOW MANY HOME-SITES HE COULD DEVELOP ON THE PROPERTY.

A. The Court has consistently required property owners to file a meaningful application for an economically viable project before bringing a takings claim.

For decades, the Court's decisions "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, 351 (1986). In case after case, the Court has made clear that an as-applied takings claim "is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186 (1985); *see also Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 136-37 (1978); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981). *Williamson County* explained that a final decision was mandated "by the very nature of the inquiry required by the Just Compensation Clause" because factors "of particular significance in the [taking] inquiry," such as the "economic impact of the challenged action and the extent to which it interferes with reasonable investment-backed expectations . . . simply cannot be evaluated until the administrative agency has arrived at a final, definitive position regarding how it will apply

the regulations at issue to the particular land in question." 473 U.S. at 190-91. *MacDonald* elaborated that "[i]t follows from the nature of a regulatory takings claim that an essential prerequisite to its assertion is a final and authoritative determination of the type and intensity of development legally permitted on the subject property. A court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." 477 U.S. at 348.

The first step in securing that determination is for the property owner to apply for the permits necessary for the project the owner wishes to build on the land. In *Agins*, for example, the Court held that an as-applied challenge to zoning ordinances that authorized between one and five single-family houses on the property owner's land was not properly before the Court because the owner had not submitted an application for such housing. 447 U.S. at 262-63; *see also San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621, 630 (1981) (dismissing appeal for lack of final judgment where state court had been unable to determine whether rezoning land for less intensive use and designating it as open space was a taking because the owner "had not made application to use or improve the property nor has it asked [the] City what development might be permitted.").

The application must be "meaningful." Accordingly, where a property owner submitted an application for "only one intense type of residential development," the Court held that the case was not yet ripe because "rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews." *MacDonald*, 477 U.S. at 352-53 nn.8-9. The Court explained that the decision of the California Court of Appeal at issue in *MacDonald* "relied on the decisions in *Agins* to illustrate that the property owners there — as here — had not 'attempt[ed] to obtain approval to . . . develop the land' . . . [and] [t]he implication is . . . that a meaningful application has not yet been made." *Id.* at 352-53 n.8 (citations omitted).

Once a meaningful application is filed, the regulatory authorities typically identify impacts that the proposed project

will cause to the surrounding properties, ecosystems, and community, and the property owner typically attempts to minimize or mitigate those impacts through changes in the project design or through remedial mechanisms such as exactions. As the Court has recognized, a property owner may have to reapply in order to respond to problems the regulatory review process revealed about an earlier proposal. *See, e.g., Penn Central*, 438 U.S. at 103-04; *MacDonald*, 477 U.S. at 352-53 nn.8-9. The property owner may also (or alternatively) be required to seek the waiver of standards through variances. *Williamson County*, 473 U.S. at 191.

The Court has consistently and repeatedly required, therefore, that an as-applied takings claim is ripe only if the property owner submits a meaningful application to develop the property, then attempts to respond to the governing agencies' concerns about that application by redesigning the project to reduce or mitigate those concerns and/or (depending upon the facts of the particular case) by seeking a waiver of the prohibitions from which the agency's concerns derive.[4]

B. Palazzolo has not submitted even one meaningful application to use the land for residential development, and his requests for permits for non-residential development are no substitute because denial of those permits does not reveal the extent of the residential use that the agency will allow.

Palazzolo's strategy at trial was to prove that his property had been taken because he had been precluded from filling eighteen acres of wetlands in order to develop a seventy-four unit residential subdivision. His counsel's opening statement in the trial stressed the need for fill to construct homes. J.A. 58. Palazzolo based his claim for compensation upon development of the subdivision, as revealed by his answers to interrogatories,

4. We have addressed the ripeness requirements imposed by the Court's precedents. State courts may apply their own ripeness rules to federal takings claims under the principles set forth in *Johnson v. Fankell*, 520 U.S. 911, 921 (1997).

which alleged a net loss of $100,000 for each of seventy-four home-sites. J.A. 47-48. The only evidence he presented at trial regarding the value of the property was based on the subdivision plan, and his appraiser asserted that the only "alternative value" of the land was to leave the land in its natural state. J.L.1 tab 7, at 14, 26.

There was one fatal error in Palazzolo's trial strategy: Palazzolo had never applied for permits for the residential use he claimed at trial had been taken.[5] Instead, either because he did not understand the basics of land use regulation, or because he was trying to manipulate the regulatory process, Palazzolo approached the permit process with the notion that if he secured a denial of an application for a "special exception" to build a bulkhead or a recreational beach facility on the property, he could use those denials to prove that CRMC would allow no residential use of the property. During the proceedings on those special exceptions, however, he denied that the use he actually sought was residential. J.A. 11; Resp't App. A-24.

The constant confusion in Petitioner's Brief about the nature of Palazzolo's takings claim highlights the fatal inconsistency between Palazzolo's permit applications and his subsequent trial strategy. Petitioner's Brief begins by trying to smooth over the problem: "Mr. Palazzolo expected that approval of [the 1983] application would allow him to proceed with the development of homes on the 74 lots that had been previously subdivided, although the 1983 application was only for the preliminary step of filling the wetlands, not the development of homes."[6] Pet. Br. 6. It then argues that "at trial, Mr. Palazzolo alleged that based on its development potential [as a subdivision], the property had a net value of $3,150,000." Pet. Br. 8. But in an apparent effort to avoid the trial court's finding that the

5. Nor did SGI apply for permits to develop the land as residences.

6. The assertion in Petitioner's Brief is contrary to the record, which shows that Palazzolo denied that his intention was to develop the filled property for residential use. *See infra* at 5, quoting from J.A. 11 and Resp't App. A-24.

environmental and public health consequences of the subdivision would constitute a nuisance, which would be fatal to a taking claim based on the subdivision, Petitioner's Brief changes course, asserting that "the subject of *this* takings inquiry, of course, is an 11.4 acre fill for a beach club that would require no septic systems." Pet. Br. 8 n.4; *see also id.* at 15 n.7. When the fact that Palazzolo never offered any evidence about the economic value of the beach club at trial becomes troublesome, however, Petitioner's brief flips back, arguing that "Mr. Palazzolo, it may be recalled, alleged that the value of his property [if developed as a subdivision] was $3,150,000 at the time it was taken." Pet. Br. 37.

Petitioner tries to escape this muddle by arguing that the applications Palazzolo filed for special exceptions established " 'what use, if any, may be made of the affected property.' " Pet. Br. 20, quoting *MacDonald*, 477 U.S. at 350. But they do not. The denials reveal only that CRMC, true to its Regulations, will not grant a special exception for a bulkhead or a private beach club where the applicant has not met the burdens of proof clearly set forth in the Regulations. They reveal nothing about what uses remain for the property. It may be that a well-conceived project that would provide broad public access to the coast, proposed by a diligent applicant who submitted complete documentation for the project and made reasonable efforts to meet the special exception's burden of proof, could be approved. We do not know, because Palazzolo's proposals were not well-conceived, well-documented, or well-justified.

But even assuming that *no* project would be accepted that required fill of *any* wetlands, we still do not know what uses remain for the land because Palazzolo's special exception strategy asked CRMC to focus only on the wetlands, not on the upland portions of the property. His applications contained no survey or topographical map that would even reveal how much upland is contained in the property.

Although Petitioner's Brief asserts that only one home would be permitted on the uplands, Pet. Br. 13, the record reveals otherwise. CRMC Director Fugate, testified on behalf of CRMC

that he knew of "upper upland portions . . . at the road that abuts the pond" but that, "because we don't have an accurate or detailed survey, there may be other upland portions . . . ." Resp't App. A-36. Fugate then was asked by Palazzolo's counsel:

> Q. So we can put a house on where it appears to be lot number twenty?
>
> A. Or somewhere around there. . . . There may also be, if I can just look at this, there may be some upland area on the backside of 80 through 75.
>
> Q. So you are saying it's theoretically possible we can put one house on Lot 20, and, depending upon where the coastal feature goes, perhaps a house up in the area of Lot 80 or 79?
>
> A. Or one — or I don't know how many. . . .
>
> Q. . . . . Now, you've indicated that there is a potential that we can build on two, perhaps three, perhaps four of the lots, correct?
>
> A. Perhaps . . .

Id. at A-38 to A-39. Later, Fugate testified that "based on my discussions with . . . [Russell Chateauneuf, of the Department of Environmental Management's ISDS section, and David Reis, CRMC's Principal Environmental Scientist], and my review of the site, the site has two uplands areas." *Id.* at A-42.

Accordingly, on this record, even after trial, we do not know how many acres of uplands there are on the property and how many houses, beyond the one everyone agrees on, could be built on each of those uplands. Petitioner's assertion that we know that "the 'extent' [of permitted development] is one home confined to the upland portion . . . ," Pet. Br. 13, is simply false. Indeed, it is inconsistent even with Petitioner's acknowledgment just a few paragraphs earlier that the Supreme Court of Rhode Island had "observ[ed] that Mr. Palazzolo could build *at least* one single-family home on the existing upland area.' " *Id.*, quoting Pet. App. A-11 (emphasis added).

Although the evidence is uncontested that the value of one home-site in 1986 was approximately $200,000, we do not know

the total economic value of Palazzolo's parcel if all the uplands were sold as home-sites. We do not know because Palazzolo never asked the relevant agencies to consider whether residential uses could be accommodated on the property.

C. Palazzolo's allegation that CRMC's refusal to allow "any" development deprived him of all beneficial use does not excuse his obligation to submit a meaningful application for the development he now claims is the only beneficial use of the property.

Petitioner's Brief attempts to escape the lack of evidence regarding the extent of residential use permitted on the upland property by arguing that further applications would be "pointless." Pet. Br. 18. CRMC's response to any application for residential use of the upland portions of the property would be "legally irrelevant," Petitioner argues, *id.*, because Palazzolo alleges "that he can realize no economically viable use of his property *unless he can develop some of the wetlands.*" *Id.* at 10 (emphasis added). Petitioner's argument involves a creative rewriting of Palazzolo's claims, and is inconsistent with the trial court's findings and with the Court's holding in *MacDonald* and earlier cases.

Palazzolo's Amended Complaint alleges:

> 15. As a result of the CRMC's *denial of Palazzolo's right to develop the property*, Plaintiff has been denied economically, beneficial use of his property from the time it was purchased in 1962. . . .
>
> 17. As a direct and proximate result of the *Defendant's refusal to allow any development of the property*, there has been a taking of private property for public use without just compensation.

J.A. 45 (emphasis added). Those allegations do not distinguish between the wetland and upland portions of the property, but focus instead on the supposed refusal to allow *any* development and the supposed absolute denial of Palazzolo's right to develop "the property."

The allegations in Palazzolo's Amended Complaint are virtually identical to those at issue in *MacDonald*, where the Court held the claim was not ripe after noting: "Appellant does not contend that only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking. *Rather, the complaint alleged that appellant was deprived of all beneficial use of its property.*" 477 U.S. at 352 n.8 (emphasis added). Petitioner's Brief seeks to escape that second sentence by asking the Court to consider "a scenario in which the property owner in *MacDonald* had indeed alleged that 'only improvements along the lines of its 159-home subdivision plan would avert a regulatory taking.' " Pet. Br. 18. This implies that Palazzolo's situation is like that hypothetical. But the allegation in Palazzolo's Amended Complaint is not the one given in the hypothetical; instead, it is virtually the same as the allegation the *MacDonald* Court refused to consider ripe.

Further, like the state courts in *MacDonald*, 477 U.S. at 345, 352 n.8, the trial court here rejected the allegation, finding that "plaintiff . . . failed to prove that he was denied all beneficial use of the subject property," Pet. App. B-9, and that plaintiff "is able to pursue a smaller and more appropriate proposal to develop the subject property." *Id.* at B-12. Palazzolo therefore is in exactly the same situation as the plaintiff in *MacDonald*. Just as it did in *MacDonald*, the Court should refuse to allow the property owner to circumvent ripeness rules with mere allegations that no economically viable use is left in the property.

Indeed, the Court has repeatedly rejected such a ploy. In *Penn Central*, for example, the property owners "urged that the Landmarks Law has deprived them of *any gainful use* of their 'air rights' above the Terminal . . . ." 438 U.S. at 130 (emphasis added). The Court nevertheless found that the claim about "the effect of the law on their ability to make use of the air rights" was not ripe because they had not "sought approval for the construction of a smaller structure." *Id.* at 136-37. In *Williamson County*, the Court held that the case was not ripe because the property owner had not applied for available variances, even though the jury had found that the denial of

subdivision plat approval denied the owner economically viable use of the property. 473 U.S. at 182.

Similarly, the lower federal courts and state courts have not allowed claimants to avoid ripeness requirements simply by alleging that the challenged action leaves no economically viable use of the land. In *Kinzli v. City of Santa Cruz*, 620 F. Supp. 609, 622 (N.D. Cal. 1985), for example, the district court reached the merits of an as-applied taking challenge to a greenbelt ordinance even though no application to develop plaintiff's land had been completed, but rejected the challenge after finding that the ordinance left beneficial uses for the property. The Ninth Circuit reversed. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *amended by* 830 F.2d 968 (9th Cir. 1987). Noting that the trial court excused the need for an application after finding that no plan could possibly be approved under the regulations that would "still interest . . . potential purchasers," the Ninth Circuit held that ripeness should not be determined "by inquiring whether any beneficial use remains." 818 F.2d at 1454 (internal citations omitted). That standard "would require courts to speculate as to what potential uses may be lurking in the hopes of the property owner and in the minds of developers and city planners. This would result in the same sort of speculation that the ripeness doctrine prohibits." *Id. See also, e.g., Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 942 n.21 (D. Haw. 1986) (finding takings claim was not ripe because plaintiffs seeking to build a resort had not submitted a development plan for any of the less intensive uses allowed under the property's "preservation" zoning, and an allegation that none of those uses was economically viable could not ripen the claim), *aff'd*, 898 F.2d 112 (9th Cir. 1990); *Larson v. Multnomah County*, 854 P.2d 476, 479 (fact that property owners claimed that none of the possible alternative uses would be economically beneficial, rather than that none would be permitted, "does not change the [ripeness] analysis"), *clarified on reconsideration*, 859 P.2d 574 (Or. Ct. App. 1993).

The two cases Petitioner cites to the contrary do not support his argument. Pet. Br. 18. In both *Greenbrier, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), and *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922 (Tex. 1998), *cert. denied*, 526 U.S. 1144 (1999), the property owners had submitted several modifications of their original proposals and had engaged in extensive negotiations with the regulatory authorities before filing their constitutional claims. In *Greenbrier*, the Eleventh Circuit noted that, because the "City has effectively conceded that the only alternative plan of development would have been under the existing [single-family] zoning," there was no uncertainty about the level of development that would be permitted. 881 F.2d at 1576. In *Mayhew*, the Texas Supreme Court found that under the "unique circumstances" of the case, in which the town rejected a compromise over the density of the project that had been "determined through negotiations between the developer and the town," the property owner should not be "required to submit additional alternative proposals, after a year of negotiations and $500,000 in expenditures, to ripen this complaint." 964 S.W.2d at 932. The *Mayhew* court did note that the owner alleged that any reductions in density beyond what it had already given up in the negotiated compromise would not be viable, *id.* at 931, but the court did not hold that such an allegation, without more, could satisfy ripeness requirements. Instead, the court repeatedly stressed "the extent to which the Mayhews worked with the Town in attempting to have their development approved." *Id.*

In contrast to the unusually extensive negotiations over the subdivision proposals involved in both *Greenbrier* and *Mayhew*, Palazzolo has never submitted even one application for the development he now claims is the only economically viable use of the land, much less ever modified his plans to accommodate concerns about the harms that development would cause. The cases Petitioner cites accordingly are inapposite, and in any event do not stand for a general rule that a property owner can ripen its claim merely by alleging that any use other than

the one the owner proposes would be economically infeasible. Such a rule would destroy the carefully crafted doctrines the Court developed over the course of several decades to ensure that courts "know[] the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 351.

Such a departure from the Court's precedent would open the door to enormous inefficiency and unfairness. If property owners can escape the ripeness requirement simply by alleging that the first proposal that is denied was the only economically viable use of the land, courts will be flooded with cases likely to be found without merit under the Court's takings doctrines, but only after both regulatory authorities and courts have wasted considerable time and resources on premature litigation. Indeed, even in the two cases Petitioner cites, the property owner's allegations that no economically viable use remained for the property were rejected on the merits. Pet. Br. 19 n.8, citing *Mayhew*, 964 S.W.2d at 937, and *Greenbrier*, 881 F.2d at 1577-80.

Petitioner's strategy for circumventing ripeness rules would empower property owners to survive motions to dismiss and use the threat of trial to chill state and local officials from exercising their land use and environmental protection authority.[7] It is no answer, as Petitioner suggests, that meritless

7. It is revealing that one of the *amici* in support of Palazzolo, the National Association of Home Builders (NAHB), nas touted the intimidating effect that loosening *Williamson County's* ripeness requirements for takings cases would have on state and local officials. NAHB approvingly described a bill that attempted to alter ripeness standards: "This bill will be a hammer to the head of these [state and local] bureaucracies." Jerry Howard, NAHB's chief lobbyist, quoted in Brody Mullins, *Property Takings Bill Set For House Fight*, National Journal's CongressDailyAM (Mar. 14, 2000). For an analysis and history of the legislation NAHB was discussing, see Glenn P. Sugameli, *"Takings" Bills Threaten People, Property, Zoning, and the Environment*, 31 Urb. Law. 177 (1999).

claims will eventually be "dismissed" because of evidence at trial from "appraisers and economists and the like . . . ." Pet. Br. 19. Especially for the many small towns that exercise land use authority, a takings trial can be so expensive that even an eventual victory on the merits is a serious threat to their budgets, and therefore a serious deterrent to rigorous review of development proposals.[8]

Further, in this case, both the trial court and the Supreme Court of Rhode Island already have rejected Palazzolo's claim that denial of the fill permit deprived him of all beneficial use of the land. Pet. App. A-11, B-10. CRMC's expert appraiser found that the 1986 value of just one home-site would be almost $200,000, after deductions for the cost of engineering and road upgrades to make the site suitable for development. The trial court found that the State's evidence was uncontradicted. Pet. App. B-5, B-9 to B-10. There is no evidence regarding the additional value of the other home-sites the record reveals might be developed, but the combination of the evidence about the value of the one home-site everyone agrees could be developed and the evidence that several more home-sites might be suitable for development leaves no doubt that the land has considerable economic value.[9]

This case therefore would be a particularly inappropriate vehicle for revisiting the ripeness rules the Court has carefully fashioned to ensure that the courts can accurately "resolve the

8. *See* Senate Committee on the Judiciary, The Private Property Rights Implementation Act of 1998, S. Rep. No. 105-242 at 30, 32, 35-37, 40-47 (1998) (minority views).

9. To put the value of the land in perspective, even if $200,000 were the total value of the land in 1986, Palazzolo's return would be more than twice what he would have earned had he invested the purchase price of the property in the stock market. If Palazzolo had invested the $8000 he paid for the property in 1959, and the $5000 SGI paid in 1969, in S & P 500 stocks, he would have had a portfolio worth $96,134 in 1986, assuming that he had reinvested both income distributions and capital appreciation. *See* Ibbotson Associates, Stocks, Bonds, Bills, and Inflation 1997 Yearbook, Table C-1.

difficult problem of . . . how to distinguish the point at which regulation becomes so onerous" that it effects a taking for which compensation must be paid. *Williamson County*, 473 U.S. at 199; *see also MacDonald*, 477 U.S. at 349. To require Palazzolo to submit an application for residential use that the evidence at trial revealed was economically viable is hardly pointless. To insist that he submit an application for residential use so that the record is clear regarding how many home-sites can be developed on the land is not to demand "legally irrelevant" applications. Instead, the Court's long-established ripeness rules correctly require that Palazzolo apply for the use he actually intends to develop (or intends to use as the basis for his takings claim), and follow the agency's permitting procedures so that those procedures can reveal "the nature and extent of permitted development." *MacDonald*, 477 U.S. at 351.

D. Palazzolo did not prove that a proposal to develop upland portions of the property would be futile.

Petitioner's claim that an application for residential development would have been "pointless" is at bottom, a claim that the application would be "futile." Some lower federal courts have recognized a "futility" exception to the ripeness requirements. *See, e.g., Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988). Palazzolo has failed completely, however, to meet the standards those courts have established for the futility exception.

Courts recognizing the futility exception have consistently required the property owner to bear the burden of proving that applications to develop the property would be futile. *See, e.g., Gilbert v. City of Cambridge*, 932 F.2d 51, 61 (1st Cir. 1991) ("Since obtaining a final municipal decision should be the rule, however, the burden of establishing futility must lie with the party seeking to bypass the permit procedure — and any reasonable doubt ought to be resolved against that party."). Those courts also have insisted that futile means more than "unlikely." In *Gilbert*, for example, the First Circuit insisted that "the mere possibility, or even the probability, that the

responsible agency may deny the permit" should not trigger the futility exception. *Id.* Instead, "a sort of inevitability is required: the prospect of refusal must be certain (or nearly so)." *Id.*

Similarly, the Court of Federal Claims has held that "rigorous statutory criteria [for approving a development permit], without more, would not be enough to trigger [the futility] exception." *Greenbrier (Lake County Trust Co. No. 1391) v. United States*, 40 Fed. Cl. 689, 702 (1998), *aff'd*, 193 F.3d 1348 (Fed. Cir. 1999), *cert. denied*, 120 S. Ct. 2740 (2000). Indeed:

> [E]ven if plaintiff showed an objective probability of denial on the merits . . . the application process could not thereby be characterized as "futile." A plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements. Administrative obstacles to the securing of a permit — such as negative agency comments or statutory presumptions — do not automatically exonerate a plaintiff from all responsibility to see the application process through to its end.

Heck v. United States, 37 Fed. Cl. 245, 252 (1997), *aff'd*, 134 F.3d 1468 (Fed. Cir. 1998).

Palazzolo has not even demonstrated "long odds," much less "inevitability." CRMC Director Fugate testified that he believed "there is a potential that we can build on two, perhaps three, perhaps four of the lots." Resp't App. at A-39. He further testified that "an ISDS system should be able to be designed and approved in the area of Lots 127, 128, and a potential one or two ISDS systems should be able to be constructed behind 68 and 71 in that area." *Id.* at A-43. When asked if it was reasonable to expect that variances would allow development on the upland lots with ISDS systems, Fugate replied "I felt that they were realistic to apply for those locations. I then discussed it [with] Mr. Chateauneuf [of the ISDS section of the Department of Environmental Management], and he gave me supporting information saying that it made sense." *Id.* at A-44. Mr. Fugate's uncontradicted testimony shows that an application

for some residential use (albeit not the grandiose seventy-four unit subdivision Palazzolo hopes for) would be far from futile or pointless.

II. SANCTIONING PALAZZOLO'S END-RUN AROUND THE MEANINGFUL APPLICATION REQUIREMENT WOULD UNDERMINE THE EFFICIENCY, FAIRNESS AND ACCURACY OF REGULATORY PERMITTING PROGRAMS.

Palazzolo's strategy for ripening his takings claim by applying for special exceptions for uses other than the residential development he now claims is the only economically viable use of the land threatens the integrity of regulatory permitting programs. His strategy flaunts the procedures that federal, state and local regulators have developed to provide a logical and efficient system of coordinated review of development proposals. Further, his strategy deprives neighboring property owners and other interested parties of notice and an opportunity to be heard about the impacts of the development the property owner claims is the only economically viable use for the land. Most importantly, Palazzolo's ploy would prevent regulators from accurately assessing the full extent of the nuisance and other harms the owner's intended use of the land would impose upon neighboring properties and the general public.

Because the permit review procedures for residential use of the land are more detailed than those required for non-residential uses, Palazzolo was able to cut corners considerably by hiding his true intentions for the land. Before submitting an application for residential use, for example, an applicant must obtain a local building permit and an individual sewage disposal system (ISDS) permit from the Rhode Island Department of Environmental Management (DEM). Resp't App. A-19 to A-22. CRMC will not even notice for public hearing an application for residential use that does not contain those prerequisite permits. J.A. 66. By declaring that his intended use of the property was not residential, and that "no sewage disposal systems are being applied for," J.L.1 tab 5, Palazzolo

managed to get his application to a hearing and before CRMC without satisfying the requirements for building and sewage system permits. To apply for a sewage system permit, for example, Palazzolo would have needed to submit a "topographic map of the details of the lots proposed, percolation testing, ground watertable testing and an indication of the location of wetlands, and certain certifications, and if necessary, also assessment on environmental impacts," as well as details of the septic system design proposed. J.A. 51; *see also id.* at 66.

For several reasons, Palazzolo's ploy, if accepted, would seriously undermine the efficiency, accuracy, and fairness of the administrative procedures used by government agencies around the country to review development proposals. First, Palazzolo's scheme circumvented the coordinated system of review that federal, state and local agencies with authority over land use and environmental regulation have established to ensure that their evaluations of permit applications proceed efficiently and logically. Here, state officials decided that CRMC should not incur the expense of considering an application for development of wetlands or coastal property if the local zoning authorities would not allow the proposed development under applicable zoning or building code regulations. A residential development's impact on the environment and on public health and safety depends in large part upon the type of sewage disposal system the development will employ. The State therefore also decided that CRMC should not consider applications for residential permits until DEM's review procedures revealed the nature of the disposal system, if any, that DEM would approve.

In designing its system of environmental and land use regulations, a State should be free to determine the sequence in which permits must be obtained. That sequence matters. It is critical both to the accuracy and efficiency of an agency's assessment of an application and to a State's allocation of resources for evaluating applications, enforcing permit requirements, and defending permit denials. Further, if several different agencies each might deny a permit, and therefore might face liability if the permit denial effects a compensable taking,

the State should be free to determine which of the agencies should bear primary responsibility for defending against any takings claims. Palazzolo's ploy would arrogate those determinations to the property owner, rather than to the State. The Court should not sanction that move by altering ripeness rules to reward property owners for hiding their intended use of the land in order to evade the orderly processes a State has established.

Second, Palazzolo's strategy threatens the fairness of the permitting system. Neighboring property owners and the general public must be given notice and an opportunity to be heard on the substance of most development proposals. If a property owner can apply for one use, but later sue for the alleged taking of a different use, the owner will be able to avoid a public hearing on the use claimed to be a taking. That may very well violate neighbors' due process rights. *Cf. Paquette v. Zoning Bd. of Review*, 372 A.2d 973 (R.I. 1977) (nullifying a decision granting a special exception because the public notice was inaccurate). The fairness of the land use regulatory system depends upon the openness of the process, and the guarantee that all interested parties will have an adequate opportunity to bring concerns about a proposed land use change to the attention of regulatory authorities. *See, e.g.*, Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 Cal. L. Rev. 837 (1983); Eric H. Steele, *Participation and Rules — The Functions of Zoning*, 1986 Am. B. Found. Res. J. 709. Palazzolo's "hide-the-ball" scheme would short-circuit that guarantee.

Third, depriving interested neighbors and the public of an adequate opportunity to speak out about the intended use of the land will deny the agency valuable information about both the effects of the intended use and the effects of denying the permit. In this case, testimony or comments of neighbors specifically addressed to the residential subdivision would have been especially important for the agency's consideration of whether, as the trial court ultimately found, relatively high density

residential use on fill would create a nuisance.[10] That determination is critical to the agency's ability to perform its statutory mandate to protect the public health and safety and to "protect the natural environment." R.I. Gen. Laws § 46-23-1. The determination of whether a residential subdivision would constitute a nuisance also is critical to an agency's assessment of its potential liability to persons harmed by any development the agency may permit. *See, e.g.*, Christopher City, Note, *Duty and Disaster: Holding Local Governments Liable for Permitting Uses in High Hazard Areas*, 78 N.C.L. Rev. 1535, 1545-46 (2000) (reviewing case law on a government's liability for permitting a land use that creates a nuisance).

Determining whether a particular land use will cause a nuisance also is vitally important for an agency assessing its potential liability under the Takings Clause, given the principles set forth by the Court in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). Palazzolo's end-run around a full public hearing on residential use of the land denied CRMC crucial information about the potential burdens such residential use would impose upon neighbors and the general public. It is ironic that Palazzolo's original Complaint alleged that CRMC had taken his land by allowing too much sewage to flow into Winnapaug Pond, Resp't App. A-27, but his strategy here would mean that CRMC could be held liable for taking his "right" to build a subdivision, even though CRMC never had occasion to hold a public hearing on the potential impacts the sewage from the subdivision would have on the Pond.

Palazzolo's shell-game strategy makes it much more difficult for regulators to assess whether the grant of a permit

10. In this case, CRMC was able to prove at trial that the planned subdivision would be a nuisance. Pet. App. B-10 to B-11. But if the Court were to allow property owners to avoid a public hearing on the use claimed to have been taken, many regulators would undoubtedly find the burden of proving a nuisance more difficult or more expensive in the absence of a public hearing that focused the attention of neighboring property owners, environmental organizations, and other interested parties on a specific proposal.

will unduly harm the public interest. It also interferes with regulators' ability to evaluate the effects of prohibiting a particular development proposal. Where a landowner has claimed throughout the administrative process that he wants to put the land to a relatively low-profit use that would not require prerequisite approvals from other authorities, the agency's estimate of the effects of denying a permit will be too low. If the agency tries to guess what the owner's true intentions are, its guess will involve speculation not only about the type, intensity and design of the intended use, but also about the probability that the intended use would be allowed by other authorities (whose processes were short-circuited by the applicant's strategic proposal). Palazzolo's strategy thus denies accurate data to regulatory agencies that factor the effect of prohibiting development into their analysis, or that wish to estimate their potential liability in the event that denial of a permit may require compensation.[11]

Administrative agencies must be able to count on the accuracy and truthfulness of the application before them when they assess the harms the application poses to neighbors and the public. Agencies cannot arrive at the best judgment about whether to permit a land use if landowners are allowed to apply for one type of development, then sandbag regulators by

11. In considering the costs of denying a permit, regulatory authorities must be able to assess whether the land may be put to profitable uses that would be less harmful than the use proposed. Again, however, a "hide-the-ball" strategy interferes with that assessment. Here, for example, Palazzolo's applications for special exceptions to fill wetlands for non-residential use resulted in a record that failed even to identify how many acres of the parcel could be developed without fill. As the Court recognized in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981), one of the happy by-products of the ripeness rules is that the process of securing a final decision provides opportunities for the parties to resolve their dispute outside the courts. A "hide-the-ball" strategy makes it much less likely that the parties can identify and agree upon economically viable uses of the land that would cause less harm to the environment than the owner's ideal development.

asserting a takings claim for something completely different. Whether Palazzolo was acting strategically, or merely misunderstood the nature of land use and environmental regulatory processes, the Court cannot sanction his attempted end-run around the ripeness rules without severely compromising the integrity of the processes that agencies charged with enforcing federal, state and local land use and environmental laws use to review development proposals.

CONCLUSION

For the foregoing reasons the judgment of the Supreme Court of Rhode Island should be affirmed.

Respectfully submitted,

VICKI L. BEEN
Counsel of Record
c/o NEW YORK UNIVERSITY
SCHOOL OF LAW
40 Washington Square South
Suite 314-H
New York, New York 10012
(212) 998-6223

GLENN P. SUGAMELI
NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W
Suite 501
Washington, DC 20036-2266
(202) 797-6865

Attorneys for Amici Curiae

Supreme Court, U.S.
FILED
JAN 3 2001
CLERK

23

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

THE STATE OF RHODE ISLAND *EX REL.* PAUL J. TAVARES, GENERAL TREASURER, AND COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF AMICUS CURIAE OF DANIEL W. BROMLEY, DAVID E. ERVIN, BARRY GOODWIN, RAY HUFFAKER, AND C. FORD RUNGE IN SUPPORT OF RESPONDENTS STATE OF RHODE ISLAND *ET AL.*

JOHN D. ECHEVERRIA
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

Counsel of Record for Amici Curiae

January 3, 2001

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

37 pp

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The "Notice Rule" Prevents Unfair Windfalls at Taxpayer Expense, Avoids Wasteful Strategic Behavior By Investors, and Properly Facilitates Economically Beneficial Change in Property Norms 4

II. A Comprehensive Understanding of How Government Action Affects Property Values Supports the Basic Fairness of the Requirement That a Taking Claimant Demonstrate the Elimination of All Economically Beneficial Use 12

III. Expansive Liability Under the Takings Clause Could Well Lead To Economically Inefficient Government Decision-Making and Encourage Inefficient Investor Behavior 20

A. The Governmental Deterrence Rationale ... 20

B. Other Efficiency Rationales 27

CONCLUSION 30

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Andrus v. Allard, 444 U.S. 51 (1979) 6, 15

Armstrong v. United States, 360 U.S. 40 (1960) 19

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) ...6, 7

Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470 (1987) 14, 15

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 9

Loveladies Harbor, Inc. v. United States, 28 F.3d 1171 (Fed.Cir. 1994)..... 4

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).....4, 8, 10, 15

Monell v. Department of Social Services, 436 U.S. 658 (1978)..... 26

Nollan v. California Coastal Commission, 483 U.S. 825 (1987).....9, 10

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 8

San Diego Gas & Electric v. San Diego, 450 U.S. 621 (1981)..... 26

Scheuer v. Rhodes, 416 U.S. 232 (1974)..... 26

United States v. Riverside Bayview Homes, Inc. 474 U.S. 121 (1985)..... 13

TABLE OF AUTHORITIES – Continued

Page

SECONDARY SOURCES

Louise K. Ahern, "Novi Mey Rethink Future," The Detroit News (May 23, 2000) 23

Vicki Been, " 'Exit' as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine," 91 Colum. L. Rev. 473 (1991)..... 25

Lawrence Berger, "A Policy Analysis of the Taking Problem," 49 New York Univ. L. Rev. 165 (1984) 27

Lawrence Blume & Daniel L. Rubinfeld, "Compensation for Takings: An Economic Analysis, " 72 California L. Rev. 569 (1984)..... 28

Robin Boadway & Neil Bruce, Welfare Economics (1984)..... 9

Robert Bork, The Tempting of America: The Political Seduction of the Law (1990) 10

Daniel A. Farber, "Public Choice and Just Compensation," 9 Const. Comment 279 (1992)..... 29

William A. Fischel & Perry Shapiro, "Takings, Insurance, and Michelman: Comments on the Economic Interpretations of 'Just Compensation' Law," 17 J. of Legal Studies 26 (1992) 21

Louis Kaplow "An Economic Analysis of Legal Transitions," 99 Harv. L. Rev. 509 (1986) 11

Saul Levmore, "Changes, Anticipations, and Reparations," 99 Colum. L. Rev. 1657 (1999) 12

Daryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," 67 U.Chi. L. Rev. 345 (2000) ...23, 28

TABLE OF AUTHORITIES – Continued

Page

Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups (1971 ed.) 25

Richard A. Posner, Economic Analysis of the Law 58 (4th ed. 1992) 21

C. Ford Runge, "The Congressional Budget Office's Regulatory Takings and Proposals for Change: One Sided and Uniformed," 7 Envtl. L. & Prac. 5 (1999) 16, 18

Timothy Searchinger, "Some Key Questions Raised by the Recent Focus in Takings Cases on 'Reduction in Value' " paper presented at Georgetown CLE Conference on Regulatory Takings (1998) 17

The economists listed in the appendix, all of whom teach and conduct research in the field of economics and related disciplines, submit this brief amicus curiae in support of the respondent State of Rhode Island.[1]

The first purpose of this brief is to use standard economic theory and principles to analyze the two issues of substantive takings law raised by this case, the validity of the "notice rule" and the scope of the regulatory takings doctrine. This analysis points to several persuasive reasons for the Court to reaffirm the notice rule and for the Court to rely on that rule in this case to deny the petitioner the taxpayer-funded recovery he seeks. This analysis also suggests that, from the perspective of economic theory, the petitioner's entitlement to financial compensation cannot reasonably be assessed without considering the full range of positive and negative effects on the property's value due to different government regulations and other actions. This approach provides a useful framework for assessing the ultimate "fairness" of the Court's traditional view that a claimant must demonstrate denial of all economically beneficial use to establish a taking.

The second purpose of this brief is to respond to the proposition, articulated by some advocates of a broad reading of the Takings Clause, that an expansive rule of takings liability would tend to maximize social welfare in

---

[1] Counsel for the parties have consented to the filing of this brief. No counsel for a party in this case authored this brief in whole or in part, and no person or entity, other than amici or their counsel, made a monetary contribution to the brief's preparation or submission. *See* Rule 37.

economic terms. This proposition is based on incomplete and unpersuasive reasoning. In fact, as we demonstrate below, an expansive reading of the Takings Clause might well reduce social welfare in economic terms.

SUMMARY OF ARGUMENT

Under the "notice rule," an investor who purchases property with actual advance notice of a regulatory restriction is barred from subsequently seeking compensation under the Takings Clause based on the restriction's application. This rule bars an investor who may have purchased property at a discounted price based on the effect of the regulation from obtaining a windfall at taxpayer expense. The rule also prevents investors from engaging in strategic rearrangements of property interests in order to maximize their chances of receiving a financial recovery under the Takings Clause; this strategic behavior would produce deadweight economic losses and permit investors to eviscerate the current limitations on the scope of regulatory takings doctrine. In addition, the notice rule achieves a reasonable and necessary balance between protecting the security of private investments and maintaining a property rights system that reflects society's contemporary values and needs.

Second, the standard for a regulatory taking based on a regulation's economic impact cannot properly be determined without an accurate accounting of how government action actually affects property value. A seemingly large "drop" in value based on a comparison of the value

of property subject to regulation and in an unregulated state gives an inaccurate and misleading picture from an economic standpoint. Market prices are an inappropriate benchmark for takings analysis when those prices do not fully capture the true costs and benefits of property being regulated, such as any flood control and water quality filtering functions of wetlands. In addition, a full and fair accounting of the effects of government on property values requires consideration of governmental "givings" as well as regulation's reciprocal burdens and benefits.

Third, some advocates of a broad interpretation of the Takings Clause contend that expansive government liability for regulatory actions under the Takings Clause would tend to maximize social welfare in economic terms. Upon analysis, this argument is unpersuasive. In fact, expansive takings liability may well reduce social welfare in economic terms. Government does not function in the same fashion as a private firm and therefore extensive assessments of financial liability would not influence behavior of government in the same fashion as it would that of a private firm. In addition, to the extent broad internalization of regulatory "costs" would affect government behavior, it would probably encourage officials to discount the benefits of government action relative to its costs. This, in turn, could lead to government decision-making that fails to maximize total social welfare. Also, a broad interpretation of the Takings Clause would likely increase the transaction costs of land use management programs and deter or delay program actions with net benefits for society due to new fiscal demands. Finally, the broad availability of financial compensation would create a form of "moral hazard"

encouraging investors to make overly risky and wasteful investments.

ARGUMENT

I. The "Notice Rule" Prevents Unfair Windfalls at Taxpayer Expense, Avoids Wasteful Strategic Behavior By Investors, and Properly Facilitates Economically Beneficial Change in Property Norms.

One issue in this case is whether an investor who buys with knowledge of the existence of a regulatory program can recover compensation under the Takings Clause if the investor is subsequently subjected to the regulatory restriction. Economic theory points to several independent grounds for upholding the "notice" rule barring recovery in this circumstance.

The first and most basic justification for the notice rule is that the investor may have paid a discounted price for the property based on the existence of the restrictions. *See Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1177 (Fed.Cir. 1994). ("In economic terms, it could be said that the market had already discounted for the restraint, so that a purchaser could not show a loss in his investment attributable to it.") If a purchaser with notice did pay a discounted price, granting compensation based on the property's unrestricted value would, everything else being equal, result in a windfall to the investor at taxpayer expense.

The point can be illustrated using an example based on the case of *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003 (1992). Mr. Lucas purchased two lots for development with the understanding that there were no restrictions prohibiting development. He paid approximately $1,000,000 for the property. A few years later, the State of South Carolina enacted a law prohibiting development of the lots. In that situation, the Court indicated, a taking almost certainly occurred. Consider, however, if the sequence of events were reversed and Mr. Lucas had acquired the property after the regulatory regime was in place. The price Mr. Lucas would have paid for the property would have depended on various factors, such as whether he might have combined the lots with other nearby property and his assessment of the possibility that the regulatory regime might change in the future. But it is fair to assume that Mr. Lucas would have paid significantly less than $1,000,000 for the property. Under this hypothetical scenario, if he then sued for a taking demanding "just compensation" should the law compel the taxpayers to pay him $1,000,000? Just as Mr. Lucas, based on the facts of the actual case, presented a compelling case of economic injury, so too Mr. Lucas, in this hypothetical example, would be seeking a simple windfall.[2]

---

[2] More generally, a decision by this Court to reject the "notice rule" would result in a massive, one-time transfer of wealth from the general public to property owners. Given that, according to our understanding, the majority of jurisdictions follows the notice rule, investors have undoubtedly factored their lack of investment-backed expectations into their estimates of their financial standing. Repudiation of the notice rule would confer a windfall on those investors who acquired hazardous and environmentally sensitive lands and who harbored little or no expectation of being able to make

The primary counter-argument, as articulated by several of petitioner's amici, is that the notice rule should be rejected, not to protect any legitimate entitlement of the purchaser herself, but to protect the expectations of the seller. According to this view, as a result of the notice rule, the owner of property subject to a new regulatory restriction would lose value because any prospective purchaser would be barred from pursuing a taking claim and, therefore, would only be willing to pay the seller a discounted price. As a result, a seller who acquired the property without advance notice of the regulatory restrictions would suffer an unanticipated (and unfair) financial loss. The notice rule should be rejected, the argument proceeds, in order to support the value of the property in the hands of the seller and thereby protect him from this loss.

This counter-argument cannot carry the day. Even if the property's value for sale is reduced, the owner can continue the property in its current use or seek to develop it herself. *See Andrus v. Allard*, 444 U.S. 51 (1979) (holding that complete abrogation of the right to sell did not effect a taking, given the other potential uses available to the owner). Moreover, it is debatable whether this type of loss in value upon sale is even the kind of effect on property covered by the Takings Clause. In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), Justice Kennedy, concurring in the judgment and dissenting in part,

---

maximum development use of the property. Repudiation of the notice rule also would encourage owners to advance large, potentially hazardous or environmentally destructive projects in order to prompt payments from the government.

observed that a regulation which causes financial loss, but which does "not operate upon or alter an identified property interest," cannot effect a taking of property with the meaning of the Takings Clause. *See also Id.* at 554 (Brever, J., dissenting). A reduction in a property's sales price seems more akin to the financial liability at issue in *Eastern Enterprises* than to an actual restriction on the use of property.

In addition, the seller's ostensible "loss" upon sale of the property following new regulatory restrictions would likely be highly speculative and difficult to quantify. If the alleged loss were based on the possibility that a development permit would be denied, but there also were the possibility that development approval would be granted, the impact of the adoption of the new restriction on the property's sales price might be modest.

The second economic argument for why a purchaser with notice of regulation should be barred from recovery under the Takings Clause is that this rule prevents strategic behavior by owners who, in the absence of the notice rule, would have a strong incentive to rearrange their property interests in order to maximize the chances of a financial recovery from the public. In practice, it would be impossible for the courts to differentiate between bona fide takings claims and those which are the result of strategic behavior. This strategic behavior would seriously undermine if not demolish existing limitations on the scope of recovery under the Takings Clause.

Again, the problem can be illustrated by an example. If a hypothetical Mr. Lucas owned a 200 acre parcel in

South Carolina, and two acres of the property were subject to the new prohibitions on coastal development, Lucas could, in the absence of the notice rule, manufacture a taking claim simply by selling off the restricted two acres. The purchaser, armed with the precedent of *Lucas* itself, and not impeded by his actual notice of the restrictions on development, would presumably have a meritorious takings claim. Thus, despite the fact that the hypothetical Mr. Lucas would lack a meritorious taking claim himself, he could easily manufacture one – and receive the economic benefit of such a claim – by rearranging his property interests in light of the new restriction.

Similarly, this Court's ruling in *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978), could easily be eviscerated if the Court did not continue to uphold the notice rule. In that case, the Court ruled that a prohibition against the development of the air space atop historic Grand Central terminal did not effect a taking given the company's opportunity to continue to use the site as a terminal. However, in the absence of the notice rule, the company could simply bypass the Court's ruling by selling the air rights to some newly established corporation which could then sue on the ground that the law eliminates all of the air rights' economically beneficial use.

The point, which could be supported by innumerable examples, is simply that the opportunity to reconfigure property interests knowing how regulatory restrictions affect a particular property would create essentially unlimited opportunities to manufacture takings claims that otherwise would not exist.

The strategic behavior that would be encouraged by elimination of the notice rule would have no economically productive value. Thus, the significant transaction costs entailed in these strategic rearrangements of property interests would produce a so-called "dead weight" economic loss. *See* Robin Boadway & Neil Bruce, Welfare Economics 240-41, 208-09 (1984).

Significantly, an owner's advance knowledge of a regulation that effects a *physical occupation* of property does not create the same incentive to engage in strategic behavior as does advance notice of a regulatory *use* restriction. This important consideration distinguishes *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), which involved an alleged physical occupation, from this case, which involves a restriction on use. In *Nollan*, of course, the Court indicated that a purchaser's advance notice that the government would impose a physical taking should not bar a taking challenge to this type of imposition.

Under the Court's decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), a regulation either effects a physical occupation or it does not based on the character of the regulation, regardless of the economic impact of the regulation or the proportion of the property affected by the physical intrusion. As a result, in a case involving an alleged physical occupation, in contrast to a case involving a use restriction, advance notice does not create an incentive to engage in strategic behavior in order to manufacture a takings claim. This distinction provides a logical basis for treating the fact that a purchaser had notice of a regulation differently depending upon whether the regulation involves a physical

occupation or a use restriction. Contrary to the views of petitioner and his amici, the Court's ruling in *Nollan* cannot automatically be extended to a case involving a use restriction.[3]

Finally, the notice rule is based on the law's logical use of the event of a sale to achieve a rough balance between, on the one hand, the social value of a property regime that conforms to contemporary circumstances and values and, on the other, the social value of stable expectations about the permitted uses of property. Change is, of course, endemic to property law. As the Court recently affirmed, "the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers." *Lucas*, 505 U.S. at 1027. Social welfare would suffer if the Takings Clause were interpreted as impeding necessary evolution in property norms by requiring the public to indemnify any owner

---

[3] To be sure, this incentive for strategic behavior could also be dealt with by equating regulatory use restrictions with physical takings and requiring the taxpayers to pay for every regulatory burden no matter how minute, as suggested in the brief of petitioner's amicus Institute for Justice, authored by Professor Richard Epstein. Suffice it to say that this radical reinterpretation of the Takings Clause has no support in either the original understanding of the Takings Clause or any of the decisions of this Court. *Cf.* Robert Bork, *The Tempting of America: The Political Seduction of the Law* 230 (1990) ("My difficulty is not that Epstein's constitution would repeal much of the New Deal and the modern welfare-regulatory state but rather that these conclusions are not plausibly related to the original understanding of the takings clause.")

burdened by social change. On the other hand, dependable expectations about the permitted uses of property, and hence the value of particular investments, fosters more investment and provides a benefit to society as a whole. From an economist's standpoint, the issue is how to balance these competing considerations.

Providing a significant degree of protection to owners' established investment expectations, but requiring purchasers with notice to conform to new property norms, achieves an appropriate economic balance between necessary legal change and stable incentives for investment. The notice rule ensures that an owner's original investment expectations are entitled to attention and respect. On the other hand, the notice rule facilitates useful social change by imposing the responsibility for dealing with new legal norms upon owners who purchased their properties with conscious understanding of the restrictions created by these new norms.

The issue of when compensation should be available under the Takings Clause during a period of legal change is related to what law and economics scholars refer to as the problem of legal "transition" policy. *See, e.g.*, Louis Kaplow, "An Economic Analysis of Legal Transitions," 99 Harv. L. Rev. 509 (1986). This scholarship poses the question of whether the risk of change in public policy should be treated the same as or differently from other kinds of risks that can affect the value of private investments. Economic efficiency will generally be maximized if risk management is left to the operation of the market, which includes adequate opportunities for private insurance programs to develop and creates useful incentives for investors to anticipate potential changes in legal rules

and adjust their plans accordingly. Because the risks of changes in the law are fundamentally the same as other kinds of business risks, the argument continues, these risks too should generally be left to the marketplace. "To the extent that a given transition policy mitigates the impact of a future reform on preexisting investment, those currently making investments will not have the proper incentive to take into account the prospects of future reform." *Id.* at 615. Accordingly, "government compensation or other transitional relief usually is inefficient." *Id.* at 615-16. *See also* Saul Levmore, "Changes, Anticipations, and Reparations," 99 *Colum. L. Rev.* 1657, 1677 (1999) (arguing that an anticipation-oriented theory of takings law provides an "elegant" explanation for the Court's differing treatment of physical occupations, which are generally difficult for owners to anticipate, and changes in regulations, which owners generally can usefully anticipate).

II. A Comprehensive Understanding of How Government Action Affects Property Values Supports the Basic Fairness of the Requirement That a Taking Claimant Demonstrate the Elimination of All Economically Beneficial Use.

A second issue raised in this case is whether compensation ought to be available under the Takings Clause when a regulatory restriction eliminates less than all of the economically beneficial use of the property. This issue undoubtedly raises a host of purely legal questions. But economic analysis can provide some insight into why the

courts have generally confined regulatory takings doctrine to "extreme circumstances." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 126 (1985).

This suit frames the takings claim by pointing to the value the property would have if the government's regulatory policies were lifted as to this property and comparing that value to the value the property presently has subject to the restrictions. According to petitioner, in the absence of the regulation the property would have a value of over $3,000,000, but in its restricted state the property has a market value of approximately $200,000, yielding a "loss" in value of over 90%. This significant apparent decline in value, according to petitioner and his amici, provides powerful support, standing alone, for this takings claim. However, from an economist's perspective, – even assuming the "before" and "after" market values were accurately calculated (an assumption that appears to be false in this case)[4] – this approach to calculating a regulation's economic impact is seriously flawed. Insofar as the size of such a "drop" in value is treated as direct evidence of an owner's entitlement to relief under the Takings Clause, this approach is completely inappropriate.

---

[4] In calculating the $3,000,000 figure, petitioner made a variety of optimistic assumptions about the effects of other applicable regulations and the engineering costs of conducting construction work in a coastal marsh. *See* Testimony of Thomas S. Andolfo, Tr. at 678-79. The Rhode Island Supreme Court termed the $3,000,000 figure "speculative" and "unrealistically optimistic." *See* 746 A.2d at 715 & n. 7.

A threshold problem with relying on estimated changes in market value of property to identify compensable takings is that the basic justification for any regulatory program is that prices set by the marketplace do not reflect the true economic value of certain goods and services not effectively supplied or priced by the market. Regulation is a response to the "market failures" that occur in the absence of government regulation. Market failure occurs, according to the standard economic account, because private economic activity generates "externalities" that are not captured by market prices. The very purpose of regulation is to alter the prices that various goods and services would otherwise command in the market. Hence, relying on the market price of property in a hypothetically unregulated state in order to appraise losses due to regulatory action is caught up in a contradiction; the reason for the regulation itself is the failure of the market and the resulting inaccuracy of price signals.

As the Court has stated, "Under our system of government, one of the state's primary ways of preserving the public weal is restricting the uses individuals can make of their property." *Keystone Bituminous Coal Assn. v. DeBenedictis*, 480 U.S. 470, 491 (1987). The Takings Clause presumably cannot be interpreted to constrain every effort by the political branches of government to regulate externalities in order to promote general economic welfare. Accordingly, a simple examination of change in a property's market value as a result of regulation cannot have determinative significance in the takings inquiry.

Furthermore, an examination of the impact of a regulation on one piece of property in isolation ignores the

significantly positive effects that the same regulation can have when it is enforced against neighboring owners. The Court has relied upon this phenomenon of "reciprocity of advantage" to justify rejecting regulatory takings claims in many cases. Zoning laws provide one example of how reciprocity of advantage operates. As the Supreme Court said in *Agins*:

> [land owners subject to a comprehensive zoning scheme] share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the [owners] might suffer.

Id. at 262.

The Court also has invoked the concept of "reciprocity" to explain more generally how all property owners benefit from different kinds of regulations. Some regulations may impose economic burdens on some property owners, and other regulations may confer economic benefits on others, but over the long-term a rough "reciprocity of advantage" is secured for all. For example, in *Andrus v. Allard*, 444 U.S. 51 (1979), the takings claim failed in part because the restriction was "a burden borne to secure the advantage of living and doing business in a civilized society." 444 U.S. at 67. *See also Keystone Bituminous Coal*, 480 U.S. at 491 ("While each of us is burdened somewhat by . . . [the] restrictions [on the uses individuals can make of their property], we, in turn, benefit greatly from the restrictions that are placed on others."); *cf. Lucas*, 505 U.S. at 1017-18 (when a regulation eliminates "all economically beneficial use," "it is less realistic to indulge our

usual assumption that the legislature is simply adjusting the benefits and burdens of economic life in a manner that secures an average reciprocity of advantage to everyone concerned.") (internal quotations omitted) (emphasis added).

In economic terms, a regulated property owner can benefit from the application of regulations to his neighbors in several different ways. First, restrictions on the use of neighboring properties can protect the regulated property from neighboring uses that would detract from the value of his property, for example, by causing pollution or flooding, or by undermining the amenity values in the community as a whole. Second, regulatory restrictions can limit the available development opportunities and thereby increase the scarcity, and hence the value, of remaining development opportunities. *See generally*, C. Ford Runge, The Congressional Budget Office's Regulatory Takings and Proposals for Change: One Sided and Uninformed, 7 *Envtl. L. & Prac.* 5 (1999).

From the perspective of economic theory, it would be nonsensical to assess the impact of a regulation on a single property in isolation without considering how the property's value is affected by the application of the regulation to neighboring properties. However, that is precisely what occurs if one attempts to estimate the value of the property simply by asking what the claimant's property, considered in isolation, would be worth if it were not subject to the regulatory restrictions. This estimate gives the owner credit for the value to him of his neighbors' compliance with the regulation and simultaneously gives him the unique benefit of lifting the regulation from his property. This mistaken approach

exaggerates the actual economic impact of a regulation on a claimant's property. As one commentator has put it, "the correct question is not how much the property would be worth if it and it alone were not subject to restrictions; it is how much the property would be worth if the restrictions did not exist and did not apply to anyone." Timothy Searchinger, "Some Key Questions Raised by the Recent Focus in Takings Cases on 'Reduction in Value' " paper presented at Georgetown CLE Conference on Regulatory Takings (1998).

From the record, it is apparent that the reciprocal advantages established by the Rhode Island coastal regulatory program have helped support and enhance the value of petitioner's property. The Coastal Council's consistent, stringent policy against the filling of coastal marshes has succeeded in preserving the environmental values of Winnipaug Pond and other areas along the Rhode Island coast, making them highly desirable areas to live and vacation. As a result, even though petitioner may not destroy wetlands in order to create buildable parcels of land, he can charge high prices for the several lots for which he can apparently receive regulatory approval. Taking into account as well the dozen lots his corporation initially sold off for development, petitioner will earn a highly favorable return on his initial $13,000 investment in this property under any circumstances. Petitioner's financial success is due, at least in significant part, to Rhode Island's coastal program. In demanding yet more income from Rhode Island's taxpayers through a taking claim, petitioner is seeking to unfairly reap both the economic benefits conferred by government regulation and public indemnification for regulation's burdens.

Tellingly, in his original complaint, the petitioner simultaneously complained about *both* the regulatory restrictions on his use of his property and the government's failure to enforce other regulatory restrictions against his neighbors. For example, he alleged that the Town of Westerly caused him economic loss by "its failure to properly regulate the dumping and discharge of sewerage into Winnipaug Pond," and by its "continu[ing] to issue building permits to other abutters along the pond causing more sewerage to be dumped into the pond." Complaint, Paras, 8, 9, dated June 20, 1988. Nothing could more clearly demonstrate, in the context of this very case and with respect to this very location, how government regulations simultaneously benefit and burden a property owner. The petitioner subsequently filed an amended complaint omitting his objections to insufficiently vigorous regulation, choosing instead to focus exclusively on how regulatory restrictions allegedly harm him. The Court should hold petitioner to his first, more balanced description of how different regulations affect his property interests.

In addition to the phenomenon of reciprocity of advantage, governmental "givings" also should be factored into the equation. Public funding of construction of roads, sewers, and other public facilities, agricultural and other subsidies, and other government tax and spending programs contribute significantly to the value of land. A large number of empirical studies have documented the enormous size of these givings; some of these studies are summarized in C. Ford Runge, "The Congressional Budget Office's Regulatory Takings and Proposals for Change: One Sided and Uninformed," 7 *Envtl. L. & Prac.*

5 (1999). In this case, the Court can take judicial notice of the fact that public investments in the interstate highway system, nearby airports, and numerous other public facilities and programs have contributed to the value of this property. Many givings are, of course, paid for by general tax revenues and provide benefits to society as a whole. It is also true, however, that luck and skillful political activity routinely result in the benefits of givings being concentrated on a small number of land owners. There is no reason to believe that land owners are any more likely to be singled out to bear the burdens of regulatory action than they are to be singled out to be the beneficiaries of governmental givings. If anything, as the country's agricultural policies and flood insurance programs suggest, the opposite is more likely to be accurate. The economic fairness of the burdens allegedly imposed by government cannot be accurately appraised without taking into account the givings.

In *Armstrong v. United States*, 360 U.S. 40, 49 (1960), the Court observed that the Takings Clause is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." On the one hand, the *Armstrong* "principle" has seemingly undeniable force. On the other hand, it can also be read as a simple tautology which adds little meaning to the language of the Takings Clause itself. Most critically, it begs the question of what, in fact, do "fairness and justice" require? For the reasons discussed, at least from the perspective of economic theory, "fairness and justice" require a full and accurate accounting of how various

public actions actually affect the value of a particular parcel of property.

III. Expansive Liability Under the Takings Clause Could Well Lead To Economically Inefficient Government Decision-Making and Encourage Inefficient Investor Behavior.

Finally, the amici wish to address the argument that some have advanced that an expansive theory of regulatory takings liability would promote economic efficiency. For the reasons described below, the amici submit that this argument is unpersuasive. Indeed, just the opposite result may occur.

A. The Government Deterrence Rationale.

The principal efficiency-based argument for subjecting government to expansive liability under the Takings Clause relies on an analogy to the incentives created for private firms by the tort law system. A private factory may discharge pollutants into a river resulting in harm, for example, to public health or to other businesses such as commercial fisheries. In a competitive economy, a profit-maximizing firm will have little or no incentive to consider these external costs in its internal business accounting. Absent some legal constraint, the factory will continue to pollute despite the fact that this result is not economically optimal for society as a whole. However, according to standard economic theory, if the firm is required to pay monetary damages to those adversely affected by its operations, the firm will be compelled to internalize the external costs. In that event, the firm will

continue to operate its polluting factory only if the benefits of operating the factory exceed the total costs, and the firm's decision will not only serve the firm's financial interest but also maximize total social welfare as well.

According to some, these ideas about cost internalization can be transferred directly to the realm of government decision-making and used as a justification for expansive takings liability. The argument starts from the premise that government "operates with an incentive structure similar to that of a similarly situated private enterprise." Richard A. Posner, Economic Analysis of the Law 58 (4th ed. 1992). The argument also posits that government regulatory actions create costs by imposing economic burdens on certain property owners. Liability under the Takings Clause, the argument continues, would "prevent[ ] the government from overusing . . . [its regulatory] power." *Id.* In just the same way that a polluting firm's business decisions will tend to be economically efficient if the firm internalizes the external costs of its operations, so too, according to this argument, government decisions would be economically efficient if the government were forced to internalize the costs of its regulatory activities through takings compensation awards. *See also* William A. Fischel & Perry Shapiro, "Takings, Insurance, and Michelman: Comments on the Economic Interpretations of 'Just Compensation' Law," 17 *J. of Legal Studies* 269, 270 (1992) (arguing that expansive takings liability would serve to "disciplin[e] the power of the state, which would otherwise overexpand unless made to pay for the resources that it consumes").

Contrary to this viewpoint, and as a number of scholars have demonstrated, extensive assessments of financial liability against the government under the Takings Clause will not necessarily increase total social welfare. In fact, expansive takings liability could well lead to net declines in total social welfare.

First, as a threshold matter, government functions very differently from a private firm and therefore cannot be expected to internalize "costs" in the same way. At the most basic level, when the government is sued for a taking it is not government's own money that is at stake, it is the taxpayers' money. A taking award ultimately involves a transfer payment from taxpayers to condemnees. Because the government's own money is not at risk, it is implausible that government would respond to financial liability in the same fashion as a private firm.

Taxpayer liabilities surely have consequences for government-decision-makers, but the influence of such liabilities is largely indeterminate. Unlike shareholders in a private firm who share a uniform pecuniary interest in the firm's affairs, the interests of citizens within a particular governmental jurisdiction are far more heterogeneous. Government officials do not automatically reflect the interests of their constituents, and in fact the interests of government officials may diverge significantly from those of their constituents. Given the relatively modest stake that most citizens have in the outcome of most government decisions, constituents face major obstacles in accurately monitoring their representatives' actions. For all these reasons, the likely effects of liability depend upon its visibility, the impact of the liability on different interest groups, the other issues on

the voters' agendas, and so on. *See generally* Daryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," 67 *U.Chi. L. Rev.* 345, 355-57 (2000).

For example, if a takings judgment were paid in a low visibility fashion, without any direct repercussions for the responsible official's budget or status, the consequences of cost internalization might be modest. On the other hand, if the judgment required an official to lay off staff or created a major budget shortfall,[5] cost internalization could force government officials to err radically in the direction of avoiding takings liability.

Second, and most importantly for present purposes, the argument for extensive takings liability based on cost-internalization suffers from a fatal asymmetry. As discussed, the cost internalization argument proceeds on the assumption that the costs of government action have to be monetized and internalized in order to influence government decision-making. But the benefits of government action represent the other side of the economic equation. Government produces a variety of benefits through regulation, from a safe food supply, to non-polluted air and water, to public safety. If the costs of regulatory programs have to be internalized through monetary payments, as the advocates of an expansive reading of the Takings Clause assert, then the benefits of regulatory programs would have to be internalized in monetary terms as well

---

[5] *See, e.g.*, Louise K. Ahern, "Novi May Rethink Future," The Detroit News (May 23, 2000) (describing how a $27 million takings judgment against a municipality forced cancellation of plans to build a new town library).

in order to create balanced incentives. Otherwise, the government calculus would be consistently skewed in favor of minimizing costs and government decision-making would tend to produce inefficient outcomes.

The reality, of course, is that the benefits of government regulatory action generally are not internalized by government. Furthermore, it is difficult as a practical matter to see how internalization could be accomplished on a broad scale. Thus, a broad takings liability rule would inevitably result only in internalization of costs and would tend to foster government decision-making that does not maximize total social welfare.

The relevance of this analysis in this case is straightforward. One may assume for the sake of argument that prohibiting development of coastal marshes maximizes total social welfare in Rhode Island by, among other things, avoiding harms to economically valuable commercial fisheries and by avoiding pollution that would cause harm to tourism, real estate, and other businesses. If the Takings Clause were interpreted to require compensation in these circumstances, the State would obviously incur a financial penalty for not issuing a permit allowing destruction of this environmentally sensitive site. On the other hand, the State cannot realize the benefits of restricting development in the same fashion. Thus, assuming the Rhode Island Coastal Council functioned like a private firm (a heroic assumption for all the reasons explained above), the asymmetry inherent in an expansive theory of regulatory takings would encourage the State to authorize the destruction of coastal wetlands despite the fact that that decision would not be optimal from an economic standpoint.

One potential response is that the political benefits to government officials of rejecting a development proposal may counter-balance the potential chilling effects of takings liability. In some cases, of course, that may be true. But if pro-regulatory political forces can exert political pressure on government officials from one side, it is equally true that opponents of regulation can exert political pressure in the opposite direction. Elected representatives are routinely called upon to weigh the costs and benefits of different decisions, both in political terms and in broader social and economic terms.

If anything, property owners are likely to be a better-organized and more vocal political force than the general public when it comes to regulatory policies. The numerous members of the general public that share in the benefits of regulatory protections are likely to be difficult to organize into an effective political force. *See generally* Mancur Olson, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971 ed.). By contrast, regulated property owners with relatively large financial stakes in regulatory policies can generally be organized to exert effective political pressure with relative ease. Even if they are outnumbered in political terms or are political outsiders, property owners have other opportunities and significant incentives to influence the outcome of political debates affecting their interests. *See* Vicki Been, " 'Exit' as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine," 91 *Colum. L. Rev.* 473 (1991). Accordingly, internalization of regulatory costs while regulatory benefits remain external cannot be

justified on the theory that this asymmetry is counterbalanced by the relative political strength of the beneficiaries of regulation. The opposite is as likely, if not more likely, to be true.[6]

Finally, the government deterrence argument ignores the significant transaction and other costs of administering an expansive regulatory takings scheme. Broad government takings liability would greatly complicate and increase the cost of existing administrative processes, require significant new investments in calculating

---

[6] In *San Diego Gas & Electric v. San Diego*, 450 U.S. 621, 661 n. 26 (1981), Justice Brennan posed the rhetorical question, "If a policeman must know Constitution, why not a planner?" This statement indicates some sympathy for the government-deterrence rationale. However, Justice Brennan's remark appeared in a case alleging that a regulation eliminated the "entire beneficial use of the property." *Id.* at 626. Thus, it cannot be interpreted as necessarily supportive of compensation for regulatory takings under a more expansive theory. In addition, the comparison to a police officer actually tends to support a narrow reading of the Takings Clause. When a municipality, for example, is sued for alleged police misconduct, the government is liable only if the misconduct represents "the government's policy or custom," *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978). This defense accords municipal officials significant latitude in carrying out their duties and allows them to continue to do their jobs effectively. *Cf. Scheuer v. Rhodes*, 416 U.S. 232, 240 (1974). By contrast, in a takings suit against a municipality the official "policy or custom" requirement will provide little protection because there generally will be no question that the regulatory decision at issue represents government policy. Thus, in contrast to the example of a constitutional tort suit based on alleged police misconduct, judicial interpretation of the Takings Clause has to do all of the work of preserving government officials' ability to govern effectively.

compensation amounts, and require new governmental efforts to increase revenues or to reallocate existing budget resources to meet the compensation requirements, especially if the full benefits of regulation cannot be internalized for the reasons stated above. Expansive takings liability would also exact other costs by requiring the public to drop or defer other socially beneficial actions that available public funding could no longer support.

B. Other Efficiency Rationales.

Aside from the questionable and quite possibly counter-productive government-deterrence argument for takings liability, takings advocates have advanced two other efficiency arguments based on the incentives that compensation would create for individual firms. Neither argument is persuasive. Furthermore, upon careful analysis, these arguments suggest that expansive compensation for regulatory takings could create incentives for firms to take economically inefficient actions.

The first argument is that the absence of compensation would cause inefficient under-investment in economically productive resources. *See, e.g.*, Lawrence Berger, "A Policy Analysis of the Taking Problem," 49 New York Univ. L. Rev. 165, 195-206 (1984). According to this view, property owners would rationally discount the value of an investment by the risk of an uncompensated taking and therefore would invest at a sub-optimal level. This reduction in investment, the argument proceeds, would reduce total social welfare.

This argument is not convincing because it ignores the fact that this reduced investment is not necessarily sub-optimal and therefore should not necessarily be

counted as an efficiency cost. One may reasonably assume, at a minimum, that many new regulations are adopted for good and valuable purposes. If owners lack an incentive to invest in property uses that may in the future be determined to be sub-optimal, that result is arguably beneficial.

Furthermore, extensive taxpayer-funded takings awards would likely lead to overinvestment because they would cause owners to disregard the risk that government regulations might be enacted to shift property to a higher economic use. Instead of solving an under investment problem, the availability of compensation would tend to create what economists call a "moral hazard" of overinvestment. As stated by Professor Darryl Levinson, "just as the generous disaster relief for flood victims encourages over-building on flood plains, and International Monetary Fund bailouts encourage too much borrowing and fiscal irresponsibility by debtor nations, full indemnification for takings condemnees encourages overinvestment in property." Daryl J. Levinson, "Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs," 67 *U.Chi. L. Rev.* 345, 390 (2000).

Another, related argument in favor of extensive takings liability is that compensation under the Takings Clause would be analogous to and would serve the same economically beneficial function as private insurance. *See, e.g.*, Lawrence Blume & Daniel L. Rubinfeld, "Compensation for Takings: An Economic Analysis," 72 *California L. Rev.* 569 (1984). According to this view, the insured risk is the risk that the government may enact a regulation that would adversely affect a property owner. The insurance

payment is the award of compensation from the government. According to standard economic analysis, private insurance promotes economically valuable activity by allowing risk-averse firms to spread the risks of their investments. Similarly, according to this argument, expansive takings compensation should promote economically efficient behavior by causing risk-averse investors to make productive investments they would otherwise shy away from making. The opportunity to spread risk created by the availability of compensation from the government, according to this view, increases total social welfare.

This theory begs the question why the insurance cannot be supplied by the private market. Taxpayer-funded compensation would, in effect, relieve the beneficiaries of the insurance, i.e., owners potentially subject to regulation, of the obligation to pay for it and would transfer the burden of paying for the insurance to taxpayers generally, many of whom would not logically participate in this kind of insurance program voluntarily. Compelling non-property owners to subsidize an insurance program for property owners would undoubtedly effect an arbitrary and regressive wealth transfer to owners. Furthermore, it is doubtful that an across-the-board compensation scheme makes economic sense. Insurance provides economic benefits when it is made available to risk-averse investors, but not all investors are risk averse and some investors, particularly large corporations, are capable of minimizing the impact of risk by acquiring a portfolio of investments. *See generally* Daniel A. Farber, "Public Choice and Just Compensation," 9 *Const. Comment* 279 (1992).

In sum, neither of these alternative efficiency arguments for an expansive theory of regulatory takings is persuasive.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

JOHN D. ECHEVERRIA
ENVIRONMENTAL POLICY PROJECT
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Avenue, N.W.
Washington, D.C. 20001
(202) 662-9850

Counsel of Record for Amici Curiae

January 3, 2001

APPENDIX

BRIEF BIOGRAPHIES OF AMICI

Daniel W. Bromley is Anderson-Bascom Professor of Applied Economics at the University of Wisconsin-Madison. His research and teaching concern the legal foundations of a market economy. He has published extensively on legal-economic institutions, including: Environment and Economy: Property Rights and Public Policy (Oxford: Basil Blackwell, 1991); Economic Interests and Institutions: The Conceptual Foundations of Public Policy (Oxford: Basil Blackwell, 1989); and "Constitutional Political Economy: Property Claims in a Dynamic World," 15 Contemporary Economic Policy 43 (1997).

David E. Ervin is Research Professor, Environmental Sciences and Resources, at Portland State University. Previously, he was Professor of Agricultural Economics at the University of Missouri-Columbia and Professor and Head of Agricultural and Resource Economics at Oregon State University. He is the lead author of *Land Use Control: Evaluating Economic and Political Effects* (Ballinger, 1977) and has written numerous journal articles on land use management. He has received several awards for research and was selected for a sabbatical leave at Cambridge University, UK in a University of Missouri competition. Dr. Ervin consults regularly on environmental issues with the Organization for Economic Cooperation and Development.

Barry Goodwin is a professor in the Department of Agricultural and Resource Economics at North Carolina State University. He specializes in the economic analysis of policy. Prior to joining the faculty of North Carolina

State University, he was on the faculty of Kansas State University. Professor Goodwin has published widely on domestic agricultural policy, trade issues, and the influence of risk on investment decision-making.

Ray Huffaker is a professor in the Department of Agricultural Economics and an adjunct professor in the Department of Natural Resource Sciences at Washington State University. He is a joint-degree graduate in law and agricultural economics from the University of California, Davis. His special areas of focus include natural resource economics, law, and policy. Professor Huffaker has written extensively on a wide range of topics, with a special emphasis on water resource management issues.

C. Ford Runge is Distinguished McKnight University Professor of Applied Economics and Law at the University of Minnesota, where he also holds appointments in the Hubert H. Humphrey Institute of Public Affairs and the Department of Forest Resources. He received his Ph.D. in agricultural economics at the University of Wisconsin, his M.A. in economics as a Rhodes Scholar at Oxford University, and his B.A. at North Carolina-Chapel Hill. He has served on the staff on the House Committee on Agriculture and as a fellow of the American Association for the Advancement of Science. He also served as Chairman of the Governor's Farm Crisis Commission in his home state of Minnesota. He is the author of four books and numerous articles concentrating on trade, agriculture and natural resources policy.

Supreme Court, U.S.
FILED
JAN 3 2001
CLERK

No. 99-2047

In The

Supreme Court of the United States

ANTHONY PALAZZOLO,

Petitioner,

v.

RHODE ISLAND *ex rel.* PAUL J. TAVARES, General Treasurer, and COASTAL RESOURCES MANAGEMENT COUNCIL,

Respondents.

On Writ Of Certiorari To The Supreme Court Of Rhode Island

BRIEF OF COUNTY OF SANTA BARBARA AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

*Stephen Shane Stark, County Counsel
Alan L. Seltzer, Chief Deputy
105 East Anapamu Street, Suite 201
Santa Barbara, California 93105
(805) 568-2950

Attorneys for County of Santa Barbara

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

SUMMARY OF ARGUMENT 2

STATEMENT OF THE CASE 3

A. *Daniel v. County of Santa Barbara* 3

B. *Parker v. California Coastal Commission* and *Cole v. County of Santa Barbara* 5

I. THE CALIFORNIA CASES INVOLVE APPLICATION OF UNIFORM PROCEDURAL RULES THAT PROHIBIT LANDOWNERS FROM COLLATERALLY ATTACKING PERMIT CONDITIONS WHERE THE LANDOWNERS OR THEIR PREDECESSORS FAILED TO TIMELY CHALLENGE THE CONDITIONS, OR COMPLIED WITH THE CONDITIONS AND ACCEPTED THE BENEFITS OF THE PERMIT 7

A. Landowners are Barred from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition 8

B. Landowners Who Comply with a Permit Condition or Accept the Benefits of a Permit, Waive Challenges to the Permit Condition for Themselves and Subsequent Owners ... 10

II. CCPOA ERRONEOUSLY CONTENDS THAT SUBSEQUENT LANDOWNERS ARE ENTITLED TO RIGHTS THAT ARE GREATER THAN THEIR PREDECESSORS 11

CONCLUSION 15

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bieneman v. City of Chicago, 864 F.2d 463 (7th Cir. 1988) 14

Block v. North Dakota ex rel. Bd. of University and School Lands, 461 U.S. 273 (1983) 15

Chin v. Bowen, 833 F.2d 21 (2d Cir. 1987) 14

City of Chicago v. Bieneman, 490 U.S 1080 (1989) 14

287 Corporate Ctr. Assocs. v. Township of Bridgewater, 101 F.3d 320 (3d Cir. 1996) 14

Federated Department Stores v. Moitie, 452 U.S. 394 (1981) 15

Levald, Inc. v. City of Palm Desert, 998 F.2d 680 (9th Cir. 1993) 14

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340 (1986) 14

McSurely v. Hutchison, 823 F.2d 1002 (6th Cir.1987) 14

Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) 13

United States v. Utah Construction Co., 384 U.S. 394 (1966) 14

Williamson Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985) 14

Wilson v. Garcia, 471 U.S. 261 (1985) 14

STATE CASES

California Coastal Comm'n v. Superior Court (Ham) 210 Cal.App.3d 1488 (1989) 9, 13

City of Santee v. Superior Court, 228 Cal.App.3d 713 (1991) 10

TABLE OF AUTHORITIES – Continued

Page

County of Imperial v. McDougal, 19 Cal.3d 505 (1977) 10

Hensler v. City of Glendale, 8 Cal.4th 1 (1994) 9

Jolly v. Eli Lilly & Co., 44 Cal.3d 1103 (1988) 12

Ojavan Investors, Inc. v. California Coastal Comm'n, 26 Cal.App. 4th 516 (1994) 9, 10, 13

Patrick Media Group, Inc. v. California Coastal Comm'n, 9 Cal.App.4th 592 (1992) 9

Pfeiffer v. City of La Mesa, 69 Cal.App.3d 74 (1977) 11

Rossco Holdings, Inc. v. State of California, 212 Cal.App.3d 642 (1989) 9, 10, 13

INTERESTS OF AMICUS CURIAE COUNTY OF SANTA BARBARA

The County of Santa Barbara is situated in south central California along one of the most beautiful stretches of California's coast. The County has 413,000 residents and was visited by 8.5 million tourists in 1999. The County provides numerous recreational opportunities for its residents and visitors, and implements a wide range of land use and environmental regulations that preserve the area's natural resources and enhance recreational opportunities while allowing for reasonable growth and development.

Although it has an ongoing interest in the taking doctrine, the County primarily submits this brief in response to claims made by an organization that calls itself the California Coastal Property Owners Association (CCPOA). The emphasis of the CCPOA amicus curiae brief is on three pending California cases involving the County, two of which are being litigated by counsel for CCPOA. CCPOA Br. at 1-3, 15-21. CCPOA contends that these cases raise issues similar to those in *Palazzolo*.

CCPOA's submission is improper because it asks the Court to become involved in pending litigation before the lower courts have concluded their review and without the Court having the benefit of the record that would be available if the cases were properly before the Court. In fact, these cases raise issues that are much different from those in *Palazzolo*. The taking claims in these cases are barred by state law rules of res judicata, statute of limitations and waiver. These state law rules are uniformly

applicable to the landowners and their respective successors in interest, regardless of any intervening change in ownership.

The County, which was not served with the CCPOA submission, seeks briefly to set the record straight and to demonstrate why the lower courts' disposition of these cases is consistent with the Court's taking doctrine.

SUMMARY OF ARGUMENT

The three California cases discussed by CCPOA are very different from *Palazzolo*. The California cases do not focus on the effect of a sale to a new owner who was aware of previous restrictions on a property's use. Instead, these cases involve landowners who collaterally attack permit conditions that were imposed by the California Coastal Commission twenty or more years ago. The predecessors of these landowners failed to file timely actions challenging the permits conditions; instead they accepted the benefits of their permits and complied with the conditions. In these circumstances, the doctrines of res judicata, statute of limitations, and waiver preclude these untimely collateral attacks, whether by the original landowners or their successors in interest. The California jurispruduence illustrates why federal courts should give effect to state rules of procedure when adjudicating taking claims.

STATEMENT OF THE CASE

CCPOA'S argument concerns three cases involving the County that are now pending in the lower courts.

A. *Daniel v. County of Santa Barbara*

The first pending litigation for which CCPOA seeks this Court's involvement is *Daniel v. County of Santa Barbara*, U.S.C.D.Cal. No. CV 98-9453 MMM. The facts are simple. In 1974 Carl Johnson applied to the Coastal Commission to divide a large parcel into four separate lots. *Daniel v. County of Santa Barbara*, U.S.C.D.Cal. No. CV 98-9453 MMM, Order Granting Motion to Dismiss, Oct. 14, 1999, CCPOA App. at 4a. The South Central Coast Regional Commission approved the parcel map, on the condition that Johnson offer to dedicate a five-foot easement for pedestrian and bicycle access to the County of Santa Barbara. *Id.* Johnson appealed this decision to the Coastal Commission, which confirmed the regional commission's decision. *Id.* at 5a. Johnson did not seek judicial review of this decision and recorded the parcel map. *Id.* In 1977 Johnson applied to the Coastal Commission to construct a residence on one of the parcels. *Id.* The Coastal Commission approved the permit on the condition that Johnson record an offer of dedication identical to the one imposed on the parcel map. *Id.* Johnson built the residence as authorized by the permit. *Id.* at 6a.

In 1987, after being contacted by the Coastal Commission, Bruce and Darleine Bucklew, who had since acquired the Johnson property, executed and recorded the irrevocable offer of dedication that was required by the coastal permit issued to Johnson. *Id.* at 6a. The plaintiffs

Ann Daniel and Leonard Hill thereafter purchased the property from the Bucklews in 1997. *Id.* at 9a. On October 6, 1998, after the County notified them that it intended to accept the offer, the plaintiffs served a "notice of rescission" of the offer of dedication on the County. *Id.* The County accepted the offer of dedication two weeks later. *Id.*

The plaintiffs then filed an action against the County, making numerous arguments that attacked the constitutionality of the 1974 and 1977 permit conditions and the ability of the County to accept the offer of dedication over their objections. *Id.* at 10a. The district court granted the County's motion to dismiss. The district court found that the alleged taking occurred at the time that the permit conditions were imposed in the 1970's because at that point the Coastal Commission exacted a future easement over the property. *Id.* at 20a. Therefore, the plaintiffs lacked standing to challenge the constitutionality of the offer of dedication, because the prior owners had conveyed away the interest that was allegedly taken before they sold the property to the plaintiffs. *Id.* at 24a-25a. The court also found that, even assuming that they had standing, the plaintiffs' challenge was barred by the statute of limitations because the original owners did not bring a timely judicial challenge when the offers of dedication were exacted many years earlier. *Id.* at 26a-27a. Finally, the taking claim was unripe because the plaintiffs had not first sought compensation in the state courts. *Id.* at 27a-29a.

B. *Parker v. California Coastal Commission* and *Cole v. County of Santa Barbara*

The other ongoing litigation challenged by CCPOA involves two related actions brought by the Stanford Farms Trust, *Parker v. California Coastal Comm'n*, San Francisco Sup. Ct. No. 305674 and *Cole v. Board of Supervisors*, Santa Barbara County Sup. Ct. No. 01003407. *See* L.A. Times, "Billionaire Battles Authorities on Access to Beach," December 11, 2000, p. A3. These cases involve a 25-acre parcel of coastal property in the Hope Ranch area of Santa Barbara. Verified Complaint for Rescission and Declaratory Relief, and Petition for Administrative Mandamus, *Parker v. California Coastal Comm'n* ("Complaint"), San Francisco Sup. Ct. No. 305674, April, 21, 1999, at 4.

In 1980, Francice Bushkin, then the owner of the property, applied to the Coastal Commission for a coastal development permit to add a sunroom and wooden deck to an existing guest house. Complaint at 5. On May 9, 1980, the Coastal Commission approved the permit. *Id.* The permit contained a condition requiring that Bushkin record an irrevocable offer to dedicate to the public a lateral access easement running across the coastal side of the property. *Id.* at 6. In May 1982, Bushkin recorded the irrevocable offer to dedicate that was required by the permit condition. *Id.* at 7. The Coastal Commission issued the permit, and Bushkin constructed the sunroom and the deck. *Id.* Bushkin did not file a legal action or otherwise challenge the permit condition.

In October 1995 the Stanford Farms Trust acquired the subject property. Complaint at 4. The Trust has never

denied that it was aware of the recorded offer of dedication when it acquired the property. On October 16, 1998, Gregory Parker, then the trustee of the Trust, recorded a document entitled "Notice of Revocation and/or Rescission of Offer to Dedicate Public Access Easement." *Id.* at 8, Ex. D to Complaint. This document recited Parker's objection to the 1980 permit condition and stated that the offer to dedicate "has been revoked and rescinded." *Id.*

The Coastal Commission found that Parker's attempt to revoke the recorded irrevocable offer of dedication violated the conditions of his predecessor's permit and issued a cease and desist order requiring that Parker take corrective action. Complaint at 9, Ex. E to Complaint. It is undisputed that the trustees have never complied with the cease and desist order, nor have they removed the revocation document from the records of the County recorder.

Parker then filed an action against the Coastal Commission. In his first two causes of action, Parker sought declaratory relief to invalidate the 1980 permit condition. Complaint at 10-11. The third cause of action was a petition for a writ of mandate that challenged the validity of the cease and desist order. *Id.* at 11-12. The Coastal Commission filed an answer and a cross-complaint for violation of the cease and desist order. On January 3, 2000, the trial court issued an order that sustained the Coastal Commission's demurrer to the first two causes of action of Parker's complaint without leave to amend on the grounds that the first two causes of action were barred by the doctrines of res judicata and waiver. *Parker v. California Coastal Comm'n*, Amended Order on Motion, January 3, 2000. The California Court of Appeal denied

Parker's petition for a writ of mandate to set aside the trial court 's order. *Parker v. California Coastal Comm'n*, Cal.Ct.App. No. A090010.) The California Supreme Court denied Parker's petition for review. *Id.*, Order of April 26, 2000.

On February 15, 2000, after the Trust's defeat in the San Francisco courts, the County accepted the irrevocable offer of dedication. Joseph Cole (the Trust's new trustee) then filed an action against the County (but not the Coastal Commission) in Santa Barbara County Superior Court. *Cole v. Board of Supervisors*, Santa Barbara County Sup. Ct. No. 01003407. This action challenges the legality of the very same irrevocable offer of dedication that the trial court in *Parker* upheld when it sustained the Coastal Commission's demurrer. On November 21, 2000, the Santa Barbara trial court sustained the County's demurrer without leave to amend.

I. THE CALIFORNIA CASES INVOLVE APPLICATION OF UNIFORM PROCEDURAL RULES THAT PROHIBIT LANDOWNERS FROM COLLATERALLY ATTACKING PERMIT CONDITIONS WHERE THE LANDOWNERS OR THEIR PREDECESSORS FAILED TO TIMELY CHALLENGE THE CONDITIONS, OR COMPLIED WITH THE CONDITIONS AND ACCEPTED THE BENEFITS OF THE PERMIT.

In an effort to connect these cases and the *Palazzolo* case, CCPOA asserts that the County and the Coastal Commission have relied on the same arguments adopted by the Rhode Island courts in *Palazzolo*. CCPOA Br. at 2. CCPOA is referring to the discussion by the Rhode Island Supreme Court that regulations in existence at the time of

acquisition form background principles of state law that shape the successor landowner's property interest. CCPOA's characterization of the arguments of the County and the Coastal Commission is untrue. As this brief makes evident, both agencies have relied on distinct state law rules that are uniformly applicable to both landowners and their successors in interest who assert untimely collateral attacks on permit conditions. CCPOA's misguided argument demonstrates the dangerous inroads on the integrity of state rules of procedure and property that are threatened by Palazzolo and his supporters.

We briefly discuss the state grounds on which the lower courts relied in rejecting these untimely collateral attacks, and then explain why these grounds are unaffected by the issues raised in *Palazzolo*.

A. Landowners are Barred from Collaterally Attacking a Permit Condition Where the Original Permittee Failed to Bring a Timely Action Challenging the Condition.

Under the California Coastal Act, an aggrieved person must file a petition for a writ of administrative mandate within 60 days of the Coastal Commission's permit decision. Cal. Pub. Resources Code, § 30801. If a landowner fails to file a timely challenge, the Coastal Commission's administrative permit decisions became final, and the application of traditional state law principles of res judicata and collateral estoppel preclude the landowner from relitigating the validity of the Coastal Commission's decision or seeking alternative forms of relief in

a different proceeding. The courts have expressed the rule this way:

> Failure to obtain judicial review of a discretionary administrative action by a petition for a writ of administrative mandate renders the administrative action immune from collateral attack, either by inverse condemnation action or by any other action. *Patrick Media Group, Inc. v. California Coastal Comm'n*, 9 Cal.App.4th 592, 608, 11 Cal.Rptr.2d 824, 833 (Cal.App. 1992).

Applying this rule, the California courts have repeatedly rejected collateral attacks on permit conditions, including public access conditions. *See California Coastal Comm'n v. Superior Court (Ham)*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (Cal.App. 1989) (rejecting collateral attack on access condition where landowner failed to file timely challenge, complied with condition and accepted benefits of permit); *Rossco Holdings, Inc. v. State of California*, 212 Cal.App.3d 642, 260 Cal.Rptr. 736 (Cal.App. 1989), *cert. denied*, 494 U.S. 1080 (1990) (barring collateral attack on access conditions where applicant failed to timely file a challenge to conditions); *Ojavan Investors, Inc. v. California Coastal Comm'n*, 26 Cal.App. 4th 516, 32 Cal.Rptr. 103 (Cal.App. 1994), *cert. denied*, 513 U.S. 1148 (failure to timely challenge permit conditions renders them immune from collateral attack).[1]

---

[1] A claim for inverse condemnation arising from an administrative action must be filed within the same period of limitations as the administrative mandamus claim. *Hensler v. City of Glendale*, 8 Cal.4th 1, 22, 876 P.2d 1043, 1056-57, 32 Cal.Rptr.2d 244, 257-58 (Cal. 1994), *cert. denied*, 513 U.S. 1184 (1995).

In *Parker* and *Cole*, the original permittee (Buskin), never filed an action challenging the Coastal Commission's 1980 permit decision; in *Daniel*, the original permittee (Johnson) also failed to challenge the Coastal Commission's decision. Therefore, any challenge to the validity of the permit conditions in these cases is barred by the statute of limitations and doctrine of res judicata, without regard to whether the challenge is being made by the original permittee or a successor in interest.

B. Landowners Who Comply with a Permit Condition or Accept the Benefits of a Permit, Waive Challenges to the Permit Condition for Themselves and Subsequent Owners.

These collateral attacks on permit conditions also are barred under the doctrine of waiver. Under this doctrine, a challenge to a permit condition is waived when the landowner complies with the permit condition or accepts the benefits of the permit. *County of Imperial v. McDougal*, 19 Cal.3d 505, 510-12, 564 P.2d 14, 17-18, 138 Cal.Rptr. 472, 474-75 (Cal.), *app. dismissed*, 434 U.S. 944 (1977) (rejecting challenge to use permit by successor to original permittee on grounds that permit runs with land and binds successor in interest and that a landowner or his successor is barred from challenging a permit condition when he either specifically agrees to the condition, fails to challenge its validity, or accepts the benefits of the permit). The rule has been applied many times. *Rossco*, 212 Cal.App.3d at 654, 260 Cal.Rptr. at 742 (waiving challenge to access condition by receiving benefits of permits and by complying with condition); *see Ojavan Investors, Inc.*, 26 Cal.App.4th at 527-28; 32 Cal.Rptr.2d at 110; *City of*

Santee v. Superior Court, 228 Cal.App.3d 713, 279 Cal.Rptr. 22 (Cal.App.1991); *Pfeiffer v. City of La Mesa*, 69 Cal.App.3d 74, 137 Cal.Rptr. 804 (Cal.App.1977).

This waiver doctrine applies in these cases. In *Parker* and *Cole*, Buskin recorded the offer to dedicate required by the Coastal Commission's permit condition and accepted the benefits of the permit by building the improvements authorized by the permit. *See* pp. 4-5 *supra*. In *Daniel*, Johnson recorded the parcel map and constructed the residence approved by the permit. *See* p. 3 *supra*. Consequently, regardless whether it is asserted by the original permittee or a successor in interest, any challenge to the validity of the permit conditions in these cases has been waived.

II. CCPOA ERRONEOUSLY CONTENDS THAT SUBSEQUENT LANDOWNERS ARE ENTITLED TO RIGHTS THAT ARE GREATER THAN THEIR PREDECESSORS.

Palazzolo argues that Rhode Island's wetlands restrictions that were enacted after his corporation acquired the property but before he acquired it are not part of the background principles that define his property interest because he cannot have lesser rights than those of his predecessor. Putting aside the merits of Palazzolo's characterization, CCPOA's argument here is the reverse of Palazzolo's; it contends in effect that successor landowners have greater rights than those of their predecessors and may assert constitutional claims that would have been unavailable to their predecessors.

Taken to its logical extreme – and CCPOA imposes no limits on it – CCPOA's argument means that landowners would be permitted to collaterally attack permit conditions on constitutional grounds with impunity, twenty, 50 or 100 years after issuance of the permit, and even after the landowners have obtained the benefits of their permit conditions during those periods. This argument highlights the unhealthy degree to which Palazzolo's supporters seek to supplant state law rules of procedure, land use and real property with a regime that federalizes every aspect of state law whenever a landowner alleges a constitutional claim.

The inherent problem with CCPOA's argument is easily demonstrated. Assume that Bushkin, the Trust's predecessor, had filed a judicial challenge to the Coastal Commission's permit condition and alleged that it sought to exact an unconstitutional taking. If the Court had issued a judgment resolving the taking claim adversely to Bushkin, no one would dispute that she and her successors in interest would be barred by the doctrine of res judicata from relitigating the validity of the permit condition twenty years later. *E.g., Jolly v. Eli Lilly & Co.*, 44 Cal.3d 1103, 1116-1117 (1988). That Bushkin failed to file a timely judicial challenge – and actually accepted the benefits of the permit and recorded the offer of dedication – leaves her and her predecessors in the same position that they would have been had Bushkin unsuccessfully litigated the taking claim.[2]

---

[2] There is another way of viewing this. The new owners in the pending cases by definition obtained title to no more than what their predecessors had a right to convey. Because the

Nevertheless, with characteristic overstatement, CCPOA contends that these cases and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), raise identical issues and that *Nollan* authorizes the plaintiffs in these cases to engage in their collateral attacks on permit conditions that were imposed more than 20 years ago. The situation in *Nollan* and these cases differ in obvious and compelling ways. In *Nollan*, the landowner timely challenged the permit condition in an administrative mandamus action, did not comply with the condition and did not accept the benefits of the permit. In these three pending cases, the predecessors of these landowners *did not timely challenge* the permit condition in an administrative mandamus action, *complied with* the condition and *accepted* the benefits of the permit. Consequently, as demonstrated pp. 8-11 *supra*, the plaintiffs in these pending cases, just like their predecessors, are precluded from challenging the validity of these permit conditions, regardless of whether the permit condition today might have satisfied the standards in *Nollan*. *Rossco*, 212 Cal.App.3d at 654-655, 260 Cal.Rptr. at 132-133; *Ham*, 210 Cal.App.3d at 1497-1499, 258 Cal.Rptr. at 570-72.

The only argument possibly left to CCPOA is that the taking doctrine requires that federal law supplant state rules of procedure and property to govern the time for asserting taking claims. CCPOA does not make such an argument, nor could it.

---

predecessors had lost their ability to timely challenge the permit conditions and instead recorded the offers of dedication before conveying their property to the plaintiffs, these plaintiffs have no standing to challenge the offer of dedication. *See Ojavan Investors, Inc.*, 26 Cal.App.4th at 528, 32 Cal.Rptr. at 110.

First, federal courts generally look to state law to provide the limitations period for federal constitutional claims. *See Wilson v. Garcia*, 471 U.S. 261 (1985) (state personal injury limitations statute applies to section 1983 claims). Although the facts of *Wilson* involved a section 1983 claim of unlawful arrest and use of force, the circuits have consistently held that the *Wilson* analysis applies to federal takings claims brought directly under the Fifth Amendment, and other direct constitutional claims. *287 Corporate Ctr. Assocs. v. Township of Bridgewater*, 101 F.3d 320, 323 (3d Cir. 1996) (direct takings claims); *Bieneman v. City of Chicago*, 864 F.2d 463, 467-70 (7th Cir. 1988), *cert. denied sub nom., City of Chicago v. Bieneman*, 490 U.S 1080 (1989) (direct takings claims); *Chin v. Bowen*, 833 F.2d 21, 23-24 (2d Cir. 1987) (action brought directly under Fourteenth Amendment); *McSurely v. Hutchison*, 823 F.2d 1002, 1005-06 (6th Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (allegation of unconstitutional surveillance); *cf. Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 689 n.4 (9th Cir. 1993), *cert. denied*, 510 U.S. 1093 (1994) (as-applied takings claims brought under section 1983).

Second, even if it were applicable, federal law would achieve the same result. This Court has repeatedly required property owners to challenge application of permit requirements and exhaust administrative and judicial remedies on a case-by-case basis before a constitutional taking claim may be brought. *Williamson Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986). The principle of administrative finality also applies under federal law, *see United States v. Utah Construction Co.*, 384 U.S. 394, 422 (1966), and the statute of limitations may bar federal

constitutional claims, *see Block v. North Dakota* ex rel. *Bd. of University and School Lands*, 461 U.S. 273, 292 (1983). Moreover, the federal rule of res judicata precludes relitigation of issues that might be decided differently today:

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. (Citations omitted.) Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. (Citations omitted.) *Federated Department Stores v. Moitie*, 452 U.S. 394, 398-399 (1981).

Under any rule of state or federal procedure, it is too late to relitigate the validity of unchallenged permit conditions imposed many years ago, no matter what the merits of those permit decisions might be in retrospect, and regardless of whether it is the original landowner or a successor that is making the challenge.

CONCLUSION

It was inappropriate for CCPOA to use the *Palazzolo* case as a vehicle for bringing its own unrelated actions to the Court, particularly in the absence of a complete record in those cases. Should the Court consider CCPOA's submission, these pending cases present very different issues than those raised in *Palazzolo* and demonstrate why courts should give effect to state rules of

property and procedure when adjudicating the timeliness of taking claims. The Court should affirm the judgment of the Rhode Island Supreme Court.

Respectfully submitted,

*Stephen Shane Stark, County Counsel
Alan L. Seltzer, Chief Deputy
105 East Anapamu Street, Suite 201
Santa Barbara, California 93105
(805) 568-2950

Attorneys for the County of Santa Barbara

Counsel of Record

January, 2001